7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 716 and 741

Privacy of Consumer Financial Information; Requirements for Insurance

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board is issuing a final privacy rule applicable to all federally-insured credit unions, as required by the recently enacted Gramm-Leach-Bliley Act (the GLB Act or Act). The final rule requires credit unions to have a privacy policy and provide certain disclosures and notices to individuals about whom credit unions collect nonpublic personal information. It also restricts a credit union's ability to disclose nonpublic personal information, including giving individuals in some cases an opportunity to opt out of the disclosure. In drafting the rule, the NCUA participated as part of an interagency group composed of representatives from the NCUA, the Federal Trade Commission, the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift

Supervision, Secretary of the Treasury, and Securities and Exchange Commission (collectively, the Agencies). The other Agencies are also required to issue regulations to implement the GLB Act. NCUA's final rule takes into account the unique circumstances of federally-insured credit unions and their members but is comparable and consistent with the regulations of the other Agencies as required by the GLB Act.

EFFECTIVE DATE: This rule is effective November 13, 2000. However, compliance is not required until July 1, 2001.

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ADDRESSES: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

FOR FURTHER INFORMATION CONTACT: Mary F. Rupp or Regina M. Metz, Staff Attorneys, Division of Operations, Office of General Counsel, at the above address or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

On February 24, 2000, NCUA issued a proposed privacy regulation as required by the GLB Act. 65 FR 10988, March 1, 2000. The comment period for the proposed

rule ended March 31, 2000. Ninety-nine comments were received on the proposal, 26 from natural person credit unions; two from corporate credit unions; four from national credit union trade associations; 20 from state credit union leagues; one from a credit union service organization; one from the Congressional Privacy Caucus; five from law firms; seven from insurance companies; three from banks; two from federal agencies; 13 from businesses; one from a special interest group; one from a private party; and 13 from miscellaneous trade groups.

As required by the GLB Act, the NCUA has consulted with the other Agencies to ensure that its final rule is consistent and comparable with the final rules of the other Agencies. However, the NCUA's rule takes into account the comments received from the credit union community. Those commenters asked NCUA to take into account the unique nature of credit union structure and operations, particularly, the relationship between a credit union and its members and credit unions and credit union service organizations (CUSOs).

NCUA's final rule mirrors the other Agencies' final rules except for modifications appropriate to address the different circumstances of credit unions such as references to credit unions, CUSOs, members and nonmembers. The section-by-section summary of comments that follows points out those provisions that differ from the other Agencies' final rules. Besides differences in terms or definitions, a significant modification is in the use of examples in the rule. All of the Agencies' final rules will contain examples to aid understanding. NCUA has attempted to use examples pertinent to credit union circumstances and, therefore, has changed or deleted some examples used in the

other Agencies' rule.

NCUA and the other Agencies are adding subparts to the table of contents in the final rule and reorganizing some of the subsections. NCUA and the other Agencies are also changing some of the language in the section names in the table of contents so that references to various notices are consistent with one another. In addition, NCUA and the other Agencies are revising various terms so that terminology is used consistently in the final rule and changing the passive voice to the active voice in several places. In some places, such as §716.6, long provisions are broken into lists. Lastly, NCUA and the other Agencies are adding sample clauses as an appendix to the final rule.

NCUA and the other Agencies are developing examination standards and guidelines. A credit union's compliance with this rule will be reviewed as part of the regular examination process.

II. Summary of comments

The NCUA requested comment on all aspects of the proposed rule as well as comment on specific provisions and issues highlighted in the proposal. Below is a discussion of the comments and changes to the proposal based on the comments. If a provision was not commented on and is not being changed in the final rule, the discussion from the proposal is not repeated.

Section 716.1 Purpose and scope.

Proposed paragraph (b) set out the scope of the NCUA rule, stating that it applies to all federally-insured credit unions. Section 505(a)(2) of the GLB Act provides that the NCUA Board has enforcement authority for federally-insured credit unions and any subsidiaries. One commenter objected to the statement in the proposal that, while CUSOs may be considered "subsidiaries," the Federal Credit Union Act does not give the NCUA direct regulatory or supervisory authority over CUSOs. The commenter states that NCUA should take regulatory responsibility for CUSOs so that there is one regulator for all credit union activities. In addition to the fact that NCUA does not have direct regulatory or supervisory authority over these entities, NCUA's position is that CUSOs should be regulated, depending on the type of business in which they engage, by the primary regulators for those activities. For example, a CUSO engaged in securities brokerage activities would be subject to the Securities and Exchange Commission's privacy regulation.

The NCUA Board specifically requested comment on whether it would be appropriate to exempt federally-insured corporate credit unions from the rule because the membership of corporate credit unions, with the exception of a few natural person incorporators, is natural person credit unions, not consumers. Twelve of the 13 commenters that responded requested that corporates be exempt. The one commenter in opposition to exemption was the Congressional Privacy Caucus. Its reason for opposing exemption is persuasive, namely that there is no authority in the GLB Act for an exemption, and therefore, if a corporate has a customer or consumer it should be required to provide the appropriate notice.

The commenters in support of exemption noted that: a corporate credit union's only contact with a consumer is through a natural person credit union; a corporate is member-owned and should be defined as an affiliate of each of its member owners; a corporate cannot perform under the burden of having to provide a privacy notice directly to natural persons; since the few natural person members a corporate may have only maintain a share account and receive no other consumer services, the rule should clarify that those individuals are not consumers; and, if a corporate receives nonpublic personal information about a natural person as part of processing member accounts for a natural person credit union, it is required to adhere to the "reuse of information" limitations in §502(c)of the GLB Act. One commenter notes that a natural person credit union may disclose nonpublic personal information to a corporate credit union in connection with a proposed or actual securitization of a loan portfolio. The commenter incorrectly equates this type of activity with "servicing and processing transactions." The proposal treated those individuals whose loans are purchased by a credit union as customers of the credit union. The final rule treats them as consumers, unless the credit union is servicing their loan, then they are members/customers. Therefore, a corporate credit union's duty to provide notice and an opportunity to opt out to individuals whose loans it purchases is only triggered if the corporate is servicing the loan or sharing nonpublic personal information about the consumers with nonaffiliated third parties that are not within an exception.

The Board agrees with the Congressional Privacy Caucus that it has no authority to exempt corporate credit unions. It appears from the comments that a corporate

credit union will rarely have natural person members or customers. Members appear limited to those corporate credit unions that have natural person incorporators that maintain a share account. Those members are limited in number and so the burden to provide initial and annual notices should be minimal. On the other hand, corporate credit unions may have consumers. Consistent with the interpretation discussed in the Federal Trade Commission's proposal and now part of the final rule, the Board does not consider the members of a natural person credit union, that itself is a member of a corporate credit union, to be the corporate credit union's members or consumers, if the corporate credit union merely provides services to the natural person credit union. In this case, the corporate credit union may receive financial information about the natural person credit union's members, but it is only as a result of providing a service to its own member credit union. 65 FR 11174, 11177 (March 1, 2000). The final rule, consistent with the other Agencies, has added an example to the definition of consumer to clarify this. 12 CFR 716.3(e)(2)(iv). In that situation, the corporate is governed by the limitations on redisclosure in §716.11.

NCUA, consistent with the other Agencies, has clarified in its final rule that initial notices are always required for customers, now defined as members, but not always for consumers by replacing "consumer" with "member" in paragraph (a)(1) and relying on paragraph (a)(2) to address consumers.

The final rule adds language to paragraph (b)(1) to clarify that commercial or agricultural purposes are included within the business purpose exemption. In addition language is added to this paragraph, clarifying that nothing in this part modifies, limits or

supersedes the standards governing certain health information promulgated by the Secretary of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996.

Section 716.2 Rule of construction.

Proposed §716.2 of the rule set out a rule of construction intended to clarify the effect of the examples used in the rule. It stated that the examples are not exclusive and that compliance with an example, to the extent applicable, constituted compliance with the rule. A few commenters objected to having the examples in the rule and suggested that they be an Appendix to the rule, so that they are not misinterpreted as being part of the regulation. An equal number of commenters supported having the examples in the rule. They found it helpful to have the examples adjacent to the provision they are clarifying. The Board agrees with those commenters and has retained the examples in the rule and at the request of the commenters provided additional examples where appropriate.

Several commenters requested that NCUA provide examples of model forms. The Board is including, as an Appendix to the rule, examples of disclosure language that a credit union may, if applicable, use as part of its disclosure.

Section 716.3 Definitions.

(a) and (g) Affiliate and Control. The proposed rule defined "affiliate" and "control" using the same definitions as the other Agencies. The Board asked for comment on whether the definitions should be amended to reflect the particular relationship between a credit union and its CUSO. The proposal, adopting the

definition in section 509(6) of the GLB Act, stated that an affiliation is found when one company controls, is controlled by, or is under common control with another company. It defined control as a 25% ownership interest; control in any manner over the election of directors or management; or the power to exercise a controlling influence over the management or policies of a company as determined by NCUA.

All 41 commenters that commented on this issue supported having a different definition of control. One of the reasons given in support of a different definition was that CUSOs are much more limited than bank affiliates. The Federal Credit Union Act (FCU Act) limits whom CUSOs can serve and the services they can provide. CUSOs must primarily serve credit unions and their members, and their services must be related to the routine operations of credit unions. Therefore, because of statutory limitations, CUSOs are closely affiliated with credit unions in the types of services they provide and the persons or entities they serve.

The commenters noted that the FCU Act limits the amount a federal credit union can invest in a CUSO to one percent of its paid-in unimpaired capital and surplus, making it difficult for a small credit union to have a 25% ownership interest in certain kinds of CUSOs. The commenters concluded that the proposed definition has a discriminatory impact on smaller credit unions because it will result in fewer smaller credit unions having affiliates and, therefore, smaller credit unions will have more burdensome disclosure requirements than larger credit unions.

Several of the commenters stressed that credit unions are part of a cooperative movement that includes their CUSOs. They all work together to solve operational

problems and help credit unions compete. There are often more than four credit unions investing in one CUSO. Members of the credit union view the CUSO as an extension of their credit union, and, in their minds, it is an affiliate of their credit union.

A few commenters suggested that certain types of CUSOs should not be covered under the privacy rules because they are performing credit union functions on behalf of the credit union's members. The examples given were shared branching and ATM services. It is unclear what the commenters meant by this comment but, if their concern was that credit unions be able to share with those CUSOs, these types of activities are specifically excluded from the opt out requirements by §716.10. If on the other hand, their concern is that CUSOs that are also financial institutions not be subject to the privacy regulation, the Agency with primary regulatory authority over the CUSO will make that determination. Section 716.3(e)(2)(iv) of the final rule clarifies that members of the credit union would not be the CUSO's customer or consumer if the CUSO's function is limited to providing services to the natural person credit union and, as part of that service, it receives financial information about the natural person credit union's member.

The proposed rule included examples of entities that are affiliates for credit unions. For a federal credit union, the only entity that is an affiliate is a CUSO, as addressed in 12 CFR part 712, that is controlled by the federal credit union. For a state-chartered credit union, an affiliate is a company that is controlled by a credit union. One commenter asked that the example for state-chartered credit unions be changed to "a company that is controlled by one or more credit unions." The current

example does not limit control to one credit union, it merely addresses how one credit union has an affiliate. The number of credit unions affiliated with a particular company will be determined by the definition of control, not by changing the example of how a credit union is an affiliate of a company.

The Board asked for comment on whether a CUSO that is 100% owned by credit unions should be considered an affiliate of all the investing credit unions, regardless of whether any one credit union owns 25%. Although unanimous in their desire to expand the definition, the commenters had different suggestions on how to handle the issue of control. Several opposed limiting the expansion to 100% credit union owned because: a limited partnership CUSO would never qualify because the CUSO rule does not permit a credit union to be a general partner; CUSOs were often started in a cooperative manner with a state league as the initial investor; and majority credit union owned CUSOs often have some non-credit union investors because of the nature of their product or service or because of the need for additional capital.

Some of the suggestions for control of a CUSO were: 100% credit union owned; 100% credit union or CUSO owned; 100% credit union or credit union related entity owned; primarily or wholly owned by credit unions; 65% credit union owned; 25% credit union owned; and any credit union ownership.

Rather than change the definition of control, the NCUA Board believes that it should remain consistent and comparable with the other Agencies, and so it has added an example to category (3) of the definition that recognizes the unique relationship between a credit union and its CUSO. Category (3) states that control of a company

includes the power to exercise control, directly or indirectly over the management or policies of the company, as determined by the NCUA. The new example states that NCUA will presume a controlling influence if the CUSO is 67% credit union owned. This percentage reflects a controlling interest by credit unions in the CUSO. In addition, the Board suggests credit unions that do not fall within the example, but believe that they have the power to exercise control, directly or indirectly, over the management or policies of their CUSO, petition the Board for a determination. The Board will process these requests for action pursuant to §790.3 of the rules. 12 CFR §790.3.

(b) Clear and conspicuous. Title V of the GLB Act and the proposed rule required that various notices be "clear and conspicuous." The proposed rule defined this term to mean that the notice is reasonably understandable and designed to call attention to the nature and significance of the information contained in the notice. The proposed rule did not mandate the use of any particular technique for making the notices clear and conspicuous, but instead allowed each credit union the flexibility to decide for itself how best to comply with this requirement. Ways in which a notice may satisfy the clear and conspicuous standard would include, for instance, using a plain-language caption, in a type set easily seen, that is designed to call attention to the information contained in the notice. Other plain language principles were provided in the examples that follow the general rule.

Several commenters recommended that the Board replace this definition with one more consistent with other Federal Reserve Board regulation definitions or modify the examples. In the final rule, NCUA and the other Agencies have retained the

definition in the proposed rule, but revised the examples. The examples are not mandatory. A credit union must decide for itself how best to comply with the general rule, and may use techniques not listed in the examples.

Several commenters requested that the Board provide clarification on the form of the notice and whether it is permissible to insert it in a newsletter or statement. The final rule clarifies that a credit union may provide the notice separately or combined with another document if the notice uses distinctive type size, style, and graphic devices.

The final rule also provides examples of how notices provided on a web site can be clear and conspicuous. This might entail, for instance, a dialogue box that pops up whenever a member accesses a web page or a simple graphic (hypertext link or hotlink) near the top of the page or in close proximity to the credit union's logo. Other elements on the web site, such as text, graphics, hyperlinks, or sound, should not distract the consumer's attention away from the notice. The example also provides that the credit union should either place the notice or a link to the notice on a screen that consumers frequently access, such as a home page. Any link to the notice should be labeled appropriately to convey the importance, nature, and relevance of the notice.

(c) Collect. The proposed rule in §716.3(c) defined collect as "to obtain information that is organized or retrievable on a personally identifiable basis, irrespective of the source of the underlying information." Several commenters recommended NCUA specify whether information that is organized or retrievable only in the aggregate is excluded from the definition. In the final rule, the NCUA and the other Agencies are revising the definition to specify that information must be organized or

retrievable by the credit union by the individual's name or by identifying number, symbol, or other particular assigned to the individual.

(e),(i) and (j) Consumer, Customer, and Customer relationship; (n) and (o) Member and Member relationship. The proposed rule defined "customer" as any consumer who has a customer relationship with a particular credit union. A customer relationship means that there is an ongoing relationship between the credit union and a consumer. These definitions paralleled the ones used by the other Agencies. Eleven commenters requested that the term "member" be used rather than customer. Some of those commenters suggested that only members be considered customers. This suggestion is contrary to the GLB Act that makes a distinction between the protections for consumers who obtain a financial product or services and those consumers that establish a relationship of a more lasting nature. Sometimes, those consumers with relationships of a more lasting nature are not actual members of the credit union and so, the definition of customer cannot be limited to actual members.

Some of the reasons in support of using the term "member," rather than "customer," and including certain nonmembers within that category were that: credit unions have a unique relationship with their members and that relationship should be reflected in their regulations; and only a member is entitled to borrow, vote, and serve on the board of a credit union.

The Board agrees with the commenters that a credit union's relationship with its members is unique and so, it has substituted the term "member" for "customer" in the final rule. NCUA used this same approach successfully in its Truth in Savings Rule. 12

CFR part 707. However, the Board cautions credit unions that the term “member,” as used in this rule, essentially parallels the term “customer” used by the other Agencies. The term “member” includes individuals who are not actually members, but are entitled to the same privacy protections provided to members. Examples of individuals that fall within the definition of “member” in part 716 are nonmember joint account holders, nonmembers establishing an account at a low-income designated credit union and nonmembers holding an account in a state-chartered credit union under state law.

Several commenters stated that customer relationship is too broadly defined and should not apply to the situation where a credit union purchases a nonmember’s loan, but the not the servicing rights. NCUA and the other Agencies agree and are deleting this relationship from the definition of member/customer relationship. A consumer will be the member/customer of the financial institution that holds the servicing rights and a consumer of the other financial institutions that own the loan.

Several commenters asked that the final rule clarify that a series of isolated transactions does not transform a consumer to a member/customer. The final rule has added an “s” to isolated transaction to clarify this point.

A few commenters noted that notices and an opportunity to opt out should not have to be provided to both the consumer and the consumer’s legal representative. NCUA and the other Agencies agree and are amending §716.3(e)(1) to reflect that it is the consumer “or” the consumer’s legal representative.

(f) Federal functional regulator. NCUA, consistent with the other Agencies, adopted the definition of “government regulator” in proposed rule §716.3(m) to include

the federal functional regulators, as defined in the GLB Act, the state insurance authorities, the Department of Treasury, and the Federal Trade Commission. One commenter objected to the definition and asked NCUA to revise it to include state regulators. The rule already takes into account the role of state regulators on the issue of affiliates.

In the final rule, the NCUA and the other Agencies are deciding not to use a definition for government regulator and instead have restated the definition for "Federal functional regulator" from the GLB Act. The term is used in the exception set out in §716.15(a)(4) for disclosures to law enforcement agencies, including a federal functional regulator, the Department of Treasury, a state insurance authority, and the Federal Trade Commission.

(l), (m) Financial institution and Financial product or service. The proposed rule defined "financial institution" in §716.3(k) as any institution the business of which is engaging activities that are financial in nature, or incidental to such financial activities, as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)). The proposed rule also exempted from the definition of "financial institution" those entities specifically excluded by the GLB Act. The proposed rule defined "financial product or service" in §716.3(l) as any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under section 4(k). The definition included the financial institution's evaluation of information collected in connection with an application by a consumer for a financial service or product even if the application is

ultimately rejected or withdrawn. It also included the distribution of information about a consumer for the purpose of assisting the consumer obtain a financial product or service. In the final rule, NCUA, consistent with the other Agencies, no longer includes such distribution of information to be a financial service. Other than this change, NCUA has retained both definitions in §716.3(l) and (m) of the final rule, but NCUA has added examples of financial institutions.

Several commenters requested that the Board list financial activities or attach section 4(k) to part 716. One commenter provided sample language. One commenter supported a de minimis exception for companies whose consumer component is less than one percent. A few commenters requested that the Board adopt the Federal Trade Commission's example which provides that an entity is a financial institution if it is significantly engaged in financial activities, such as a retailer that extends credit by issuing its own credit card directly to consumers. The Federal Trade Commission also provided an example that a financial institution does not include a business that only accepts payment by check or cash, or through credit cards issued by others, or through deferred payment or "lay-away" plans. A few commenters also requested that the Board clarify the definition of financial products and services or expand it with examples.

Examples of activities that are financial in nature include: lending, exchanging, transferring, investing for others, or safeguarding money or securities; insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes

of the foregoing, in any state; providing financial, investment, or economic advisory services; and underwriting, dealing in, or making a market in securities. Examples of activities that are incidental to financial activities include: brokering or servicing loans; leasing real or personal property (or acting as agent, broker, or advisor in such leasing) without operating, maintaining or repairing the property; appraising real or personal property; check guaranty, collection agency, credit bureau, and real estate settlement services; providing financial or investment advisory activities including tax planning, tax preparation, and instruction on individual financial management; management consulting and counseling activities (including providing financial career counseling); courier services for banking instruments; printing and selling checks and related documents; community development or advisory activities; selling money orders, savings bonds, or traveler's checks. The activities also include leasing real or personal property (or acting as agent, broker, or advisor in such leasing) where the lease is functionally equivalent to an extension of credit; acting as fiduciary; providing investment, financial, or economic advisory services; and operating a travel agency in connection with financial services. The Board of Governors of the Federal Reserve and the Department of Treasury have authority under section 4(k) to determine other activities in the future to be financial in nature or incidental to financial activities.

Due to the wide range of activities that are defined as financial in nature under Section 4(k) of the Bank Holding Company Act, the definition of "financial institution" encompasses a broad spectrum of businesses. In the final rule, the NCUA has added examples of financial institutions, including nontraditional financial institutions. These

may include, but are not limited to: personal property appraisers; real estate appraisers; career counselors for employees in financial occupations; digital signature services; courier services; real estate settlement services; manufacturers of computer software and hardware; and travel agencies operated in connection with financial services. However, many entities that are within the broad definition of financial institution likely will not be subject to the rule's disclosure requirements because not all financial institutions have consumers.

(q), (r), and (s) Nonpublic personal information, Personally identifiable financial information, and Publicly available information.

(q) Nonpublic personal information. The Board invited comment on two alternative interpretations of the definition of nonpublic personal information in proposed §716.3(o). Alternative A defined nonpublic personal information to include personally identifiable financial information and any list, description, or other grouping of consumers and any publicly available information pertaining to them that is derived using personally identifiable financial information. The proposed rule excluded publicly available information from the scope of "nonpublic personal information" when the information is part of a list, description, or other grouping of consumers that is derived without using personally identifiable financial information. The example that followed the general definition clarified that publicly available information and other identifying information about consumers, such as addresses, would be considered nonpublic personal information if the information is derived from information consumers provided to a financial institution on an application.

Alternative B would have permitted a financial institution to release publicly available information regardless of the source, but still would have prohibited the release of this information as part of a list, description or other grouping of consumers that was derived using personally identifiable financial information. Thus, under alternative B, a credit union could have disclosed the name, address, or other information available to the general public about an individual, as long as it was not disclosed as part of a list.

Alternative A would have required compliance with the notice and opt out requirements if the credit union had received such information from the individual. Under alternative A, in order for the information to be considered publicly available, the credit union would have had to obtain the information from government records, widely distributed media, or government-mandated disclosures. The fact that information was available from those sources would have been immaterial if the credit union did not actually obtain the information from one of them.

Approximately 40 commenters supported alternative B, that information should not be nonpublic personal information if it is publicly available. A few commenters supported alternative A. The Congressional Privacy Caucus urged the Agencies to adopt alternative A because, unless the financial institution has actually obtained the data from a public source, it cannot be certain the information is publicly available. The consensus of the interagency group is to adopt the broader, alternative B, with modifications. Therefore, nonpublic personal information does not include publicly

available information, except if it is disclosed in the form of a list derived using personal identifiable financial information.

The final rule adopts an approach that the NCUA and the other Agencies believe incorporates the benefits of both alternatives. Under the final rule, information will be deemed to be "publicly available" and therefore excluded from the definition of "nonpublic personal information" if a credit union reasonably believes that the information is lawfully made available to the general public from one of the three categories of sources listed in the rule. 12 CFR §716.3(s)(2). In this way, a credit union will be able to avoid the burden of having to actually obtain information from a public source, but will not be free simply to assume that information is publicly available without some reasonable basis for that belief. The final rule cites, as an example of information a credit union might reasonably believe to be publicly available, the fact that someone has a loan that is secured by a mortgage in jurisdictions where mortgages are recorded. 12 CFR §716.3(s)(3)(iii)(1). The rule also states that a credit union will have a reasonable basis to believe that a telephone number is publicly available if the credit union either looked the number up in a telephone book or was informed by the consumer that the number is not unlisted. 12 CFR §716.3(s)(iii)(2).

NCUA also specifically invited comment on whether the definition of "nonpublic personal information" would cover information about a consumer that contains no indicators of a consumer's identity. Approximately 40 commenters said no, that aggregated data should not be nonpublic personal information because it is not personally identifiable.

Some commenters contended that the fact that an individual is a customer or consumer of a financial institution is not nonpublic personal information. They also requested that the regulation allow financial institutions to sell lists of consumers and customers. A couple of commenters concurred with the Board's inclusion of lists of consumers as nonpublic personal information.

The final rule in §716.3(q) includes examples of lists that would and would not be considered nonpublic personal information. A list of individuals' names and street addresses that is derived using personally identifiable financial information, other than publicly available information, would be nonpublic personal information. Such a list that is not derived using personally identifiable financial information and does not indicate that individuals on the list are a consumer of the credit union would not be nonpublic personal information.

(r) Personally identifiable financial information. The GLB Act defined "nonpublic personal information" to include "personally identifiable financial information" but did not define the latter term. The proposed rule in §716.3(p) generally defined personally identifiable information as information a credit union obtains in connection with providing a consumer a financial service or product. A few commenters supported this definition. Approximately 30 commenters said that proposed definition is too broad and that personally identifiable financial information should not include nonfinancial information.

NCUA continues to believe that this approach creates a workable and clear standard for distinguishing information that is financial from information that is not, while

at the same time giving meaning to the word “financial.” The broad scope of what is deemed a “financial product or service” under the GLB Act requires a comparably broad scope of what is deemed “financial information.”

NCUA and the other Agencies have revised the definition in the final rule §716.3(r) to add a couple of additional examples of what would and would not be personally identifiable financial information. One of the new examples of personally identifiable financial information is information the credit union collects through an Internet cookie, an information collecting device from a web server. A new example of what would not be personally identifiable financial information is information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers, such as account numbers, names or addresses.

NCUA has retained other examples of personally identifiable financial information from the proposed rule. One such example is the fact that an individual has been a credit union’s member or has obtained a financial product or service from it. NCUA disagrees with those commenters who maintain that member relationships should not be considered personally identifiable financial information. Clearly, information that a particular person has a member relationship identifies that person, and this is personally identifiable. The NCUA believes that this information is also financial, because it communicates that the person has a financial relationship with the credit union. While this information would in many cases be a matter of public record, that does not change the analysis of whether the information is personally identifiable financial information.

(s) Publicly available information. The proposed rule in section §716.3(q) defined “publicly available information” as information lawfully made available to members of the general public that is obtained from three broad types of sources: official public records, widely distributed media, or information from public disclosures required by law. The proposed rule stated that information obtained over the Internet would be considered publicly available information if it was obtainable from a site available to the general public without requiring a password or similar restriction.

The Board invited comment on what information should be considered publicly available, particularly in the context of information available over the Internet. Approximately 35 commenters wrote that publicly available information includes information that could be derived from a public source, even if it is obtained from a nonpublic source, such as an application for financial services. Several commenters wrote that publicly available information should include name, address, and phone number. A couple of commenters suggested that the Board model its definition after the Securities and Exchange Commission’s definition of publicly available information.

The NCUA and the other Agencies have modified and adopted the Securities and Exchange Commission’s proposed definition in the final rule. NCUA’s final rule defines "publicly available information" as information the financial institution has a reasonable basis to believe is lawfully made available to the general public from the three broad types of sources. 12 CFR §716.3(s). The NCUA and the other Agencies have decided that financial institutions have a reasonable basis to believe information is lawfully available to the general public if they take steps to determine that the

information is of the type available to the general public and, if an individual can direct that the information not be made available to the general public, that an individual has not done so. The examples of what constitutes a reasonable basis were discussed in the above section on nonpublic personal information.

Publicly available information will be excluded from the scope of "nonpublic personal information," whether or not the credit union obtains it from a publicly available source (unless, as previously noted, it is part of a list of consumers that is derived using personally identifiable financial information). Under this approach, the fact that a consumer has given publicly available information to a credit union would not automatically extend to that information the protections afforded to nonpublic personal information.

Several commenters objected to the example in §716.3(q)(2)(ii) of the proposed rule that publicly available information from widely distributed media includes information from an Internet site that is available to the general public "without requiring a password or similar restriction." The NCUA and the other Agencies agree with the commenters that some web sites require a password or fee to obtain public information. Therefore, the example in the final rule provides that widely distributed media includes information from a web site that is available to the general public on an unrestricted basis. The fact that a web site has a fee or password does not render the web site restricted.

Subpart A-Privacy and Opt Out Notices

Section 716.4 Initial privacy notice to consumers required.

The GLB Act requires a financial institution to provide an initial notice of its privacy policies and practices in two circumstances. For customers, the notice must be provided at the time of establishing a customer relationship. For credit unions, ordinarily this will be at the time an individual applies for membership. For consumers who do not become members, the credit union must provide the notice prior to disclosing nonpublic personal information about the consumer to a nonaffiliated third party.

Proposed §716.4(a) required a credit union to provide an individual a privacy notice prior to the time that it establishes a customer relationship. The final rule provides that the credit union must provide the initial notice not later than the time it has established a member relationship. Nothing in the proposed rule is intended to discourage a credit union from providing a privacy notice at an earlier point in the relationship to make it easier for an individual to compare several institutions' privacy policies and practices in advance of conducting transactions.

The final rule provides in §716.4(c)(2) that a credit union establishes a member relationship with a consumer when the credit union originates or the consumer's loan. However, if the credit union transfers the servicing rights to a loan, the membership relationship transfers with the servicing rights. The final rule provides examples of this "loan rule" in §716.4(c)(3)(ii), including examples of a credit union that originates the loan and retains the servicing rights or purchases the servicing rights to the loan.

A few commenters requested that the rule not require a new opt out notice when

an existing customer opens a new account. NCUA agrees that it is unnecessary for a credit union to provide a member with additional copies of its initial notice every time the member obtains a financial product or service. The final rule in §716.4(d) contains a new provision that the credit union need not provide a new privacy notice to an existing member who has already received a notice that was accurate with respect to the new financial product or service. If the credit union's privacy policies and practices have changed, the credit union may provide the member with a revised privacy notice if it chooses to do so. Under §716.8, the credit union would have to provide a new privacy notice if the new account was not covered by the previously provided notice.

The proposed rule in §716.4(f) provided that, if a credit union and consumer orally enter into a contract for financial services over the telephone, the credit union may provide the consumer with the initial notice after providing the service so as not to delay the transaction. Several commenters wrote that when accounts are opened over the phone it would be reasonable for the credit union to provide the disclosures, including opt out notices at a reasonable time after the transaction, such as within 20 days. They contended that the rule should not require the consumer to consent to the subsequent delivery of the notice. This would be consistent with the requirements under the Truth in Savings Act. One commenter wrote that the notice should be in writing at the time the service is provided, not later.

Consistent with the proposed rule, the final rule allows, in some cases, for subsequent delivery of initial notices within a reasonable time after the credit union establishes a member relationship and examples of this under §716.4(e). First, the

credit union may provide notice after the fact if the establishment of the member relationship is not at the customer's election. This might occur, for instance, when a share account is transferred. Second, a credit union may send notice after establishing a member relationship when to do otherwise would substantially delay the consumer's transaction and the consumer agrees to receive the notice at a later time. An example of this would be when a transaction is conducted over the telephone and the member desires prompt delivery of the financial product or service. Third, the final rule also permits after-the-fact notices when an independent third party arranges the member relationship on the credit union's behalf without its prior knowledge. Typical of this type of arrangement would be the submission to a credit union by a college's financial aid office of a completed student loan application along with a request for prompt disbursement upon the credit union's acceptance of the application.

The Board notes that in most situations, and particularly in situations involving the establishment of a member relationship in person, a credit union should give the initial notice at a point when the consumer still has a meaningful choice about whether to enter into the member relationship. The exceptions listed in the examples, while not exhaustive, are intended to illustrate the less frequent situations when delivery either would pose a significant impediment to the conduct of a routine business practice or the consumer agrees to receive the notice later in order to obtain a financial product or service immediately.

In circumstances when it is appropriate to deliver an initial notice after the member relationship is established, a credit union should deliver the notice within a

reasonable time thereafter. A few commenters requested that the final rule specify precisely how many days a credit union has in which to deliver the notice under these circumstances. However, the Board believes that a rule prescribing the maximum number of days would be inappropriate because (a) the circumstances of when an after-the-fact notice is appropriate are likely to vary significantly, and (b) a rule that attempts to accommodate every circumstance is likely to provide more time than is appropriate in many instances. Thus, rather than establish a rule that the Board believes may be viewed as applicable in all circumstances, the Board elected to retain the more general rule as set out in the proposal in §716.4(e)(1).

As the Board noted in the preamble to the proposed rule, nothing in the rule is intended to discourage a credit union from providing an individual with a privacy notice at an earlier point in the relationship if the institution wishes to do so in order to make it easier for the individual to compare its privacy policies and practices with those of other financial institutions in advance of conducting transactions. The Board requested comment on who should receive a notice where there is more than one party to an account. Approximately 50 commenters replied that the regulation should require only that the primary account holder should receive the notice and right to opt out. The reasons in support of giving only the primary account holder notice and opt out rights were that: this is consistent with other regulations; some joint account holders are minors; some live in the same households as each other; addresses for some joint account holders are not available; and it would be burdensome to provide notice and opt out to all account holders. A few commenters wrote that the financial institution

should have the option to offer more than one party to an account individual notice and opt out rights and incur the extra cost.

The commenters who noted that one notice is consistent with other regulations cited those implementing the Equal Credit Opportunity Act (Regulation B, 12 CFR part 202) and the Truth in Lending Act (Regulation Z, 12 CFR part 225). Commenters noted that under both regulations, a financial institution is permitted to give only one notice. The authorities cited include requirements that the financial institution give disclosures, as appropriate, to the "primary applicant" if this is readily apparent (in the case of Regulation B; see 12 CFR 202.9(f)) or to a person "primarily liable on the account" (in the case of Regulation Z; see 12 CFR 226.5(b)).

The Board found these comments persuasive with respect to financial products and services, other than loans (including lines of credit). The Board believes that co-makers and guarantors on loans should receive the notice and right to opt out because of the extent and nature of nonpublic personal information provided to the credit union in conjunction with these types of transactions. Co-makers and guarantors of loans are entitled to receive separate notices. The final rule in §716.4(f) provides that if two or more consumers obtain a financial product or service, other than a loan, from the credit union jointly, it may satisfy the initial notice requirement by providing one initial notice to those consumers jointly, but that either consumer may exercise the opt out right.

For ease of reference, the final rule provides in §716.4(g) that credit unions should refer to §716.9 for methods of delivering an initial privacy notice or §716.6 for initial notices for nonmember consumers.

Section 716.5 Annual privacy notice to members required.

The proposed rule required a credit union to provide customers with a clear and conspicuous notice that accurately reflects the privacy policies and practices, once during any period of twelve consecutive months. Although the GLB Act requires financial institutions to provide annual notices to customers, several commenters recommended eliminating the requirement. A few commenters wrote that the Board should require credit unions to send the notice once every calendar year, not once annually, so that they can send the notices to all customers in a mass mailing with other required disclosures. The final rule provides that the credit union may define the 12-consecutive-month period, and includes a new example.

The Board requested comment on whether the example of dormant accounts provides a clear standard for whether an individual is exempt from the annual notice requirement and whether the applicable standard should be the credit union's policies or state law. The Board also requested comment on whether the standard should apply to members as well as nonmembers.

A few commenters supported application of the dormant account standard under state law. Several commenters supported use of the term inactive instead of dormant. Several commenters wrote that the credit union's policy on inactive accounts, rather than state law on dormant accounts should apply. These commenters contended that reliance on state dormancy laws might produce conflicting results and unnecessary burden for credit unions operating in more than one state. Several commenters supported a standard of 12 months with no documented account activity rather than

either term. The final rule retains the examples and uses the term inactive instead of dormant. The Board believes an example that suggests credit unions look to their own inactive account policies provides adequate guidance and greater flexibility than suggesting credit unions look to state dormancy laws.

Some commenters said members and nonmembers should be treated the same with regard to the standard for dormant accounts. The Board has retained the distinction between nonmember and member inactive accounts because a credit union may still have a duty to provide notices to an individual who is a member under the credit union's bylaws, regardless of whether a member's account has been declared inactive. The duty to provide notice to an individual who is a member under the credit union's bylaws only ceases when the member relationship terminates.

Section 716.6 Information to be included in initial and annual privacy notices.

The proposed rule provides the required content for the initial and annual notices to customers. The proposed rule required notices to include: categories of nonpublic personal information that a credit union may collect; categories it may disclose; categories of affiliates and nonaffiliated third parties to whom a credit union discloses nonpublic personal information; information about former customers; information disclosed to service providers; the right to opt out; disclosures made under the Fair Credit Reporting Act (FCRA); and confidentiality, security, and integrity standards. The final rule provides that a credit union need only include each of the above items that apply to it, but may include other information.

Several commenters found these requirements burdensome and more detailed

than the GLB Act requires. One commenter requested that the right to opt out not be disclosed in the privacy notice. A few commenters requested that the Board use the plain language of the GLB Act for the content of the notice and delete other requirements. The final rule provides that a credit union may send a short-form initial notice with an opt out notice for nonmember consumers under §716.6(c). This short-form must state that a privacy notice is available upon request and provide a reasonable means, such as a toll-free number, by which the consumer may obtain the notice.

The proposed rule requested comment on whether a disclosure that a credit union makes disclosures as permitted by law to nonaffiliated third parties in addition to those described in the notice would be adequate. Several commenters wrote that this disclosure was adequate. A couple of commenters objected to this disclosure because the GLB Act specifically exempts notice in these instances and it could cause consumer confusion. The final rule retains the provision for disclosures as permitted by law as the NCUA and the other Agencies proposed it.

Several commenters requested that the Board clarify the meaning of the terms "categories of information" that are "collected" and "disclosed" and amend the examples. A few commenters recommended the rule retain the examples used for the categories of information collected and repeat those examples for the categories of information disclosed. NCUA and the other Agencies are revising and expanding the examples for these terms in the final rule in §716.6(e).

One commenter suggested that the Board create an exemption from the annual

notice requirement for credit unions that do not share nonpublic personal information with nonaffiliated third parties. NCUA and the other Agencies are rejecting this suggestion, but the final rule in §716.6(e)(5) permits credit unions to provide simplified notices if they do not disclose or intend to disclose nonpublic personal information to affiliates or nonaffiliated third parties except under the exceptions authorized in §§716.14 and 716.15.

The proposed rule stated that the NCUA was in the process of preparing proposed section 501 standards relating to administrative, technical, and physical safeguards. A few commenters wrote that credit unions need guidance on security standards. The NCUA intends to issues proposed standards as an appendix to this regulation for notice and public comment in approximately one month.

A couple of commenters wrote that the disclosures of who has access to the information were unnecessary and could be harmful to a financial institution's security. The final rule provides that the credit union need only describe in general terms who is authorized to have access to the information and provides an example in §716.6(e)(6).

A few commenters requested that the rule clarify that the privacy policies and practices of several different affiliated financial institutions may be described on a single notice. Related to this point, commenters requested that the final rule address whether affiliated financial institutions, each of whom has a customer or member relationship with the same consumer, may elect to send only one notice to the consumer on behalf of all of the affiliates covered by the notice and have that one notice satisfy the disclosure obligations under §716.4 of each affiliate. NCUA and the other Agencies

agree that financial institutions should be able to combine initial disclosures in one document. The final rule reflects this flexibility, in §716.6(e)(7). NCUA and the other Agencies emphasize that the notice must be accurate for all financial institutions using the notice.

Section 716.7 Form of opt out notice to consumers and opt out methods.

The proposed rule in §716.8 provided as an example that a credit union will provide adequate notice of the right to opt out if it identifies: the categories of information that may be disclosed; the categories of nonaffiliated third parties to whom the information may be disclosed; and that the consumer may opt out of those disclosures. The final rule adds that the credit union should also identify the financial products or services that the consumer obtains, either singly or jointly from the credit union, to which the opt out direction would apply.

The proposed rule also provided several examples by which a credit union may provide a reasonable means for the consumer to opt out, including check off boxes, self-addressed stamped reply forms, and electronic mail addresses. Approximately 20 commenters requested that the Board delete the stamped reply example, contending it is unreasonable, unfair, costly to financial institutions, and not a statutory requirement. A couple of commenters supported the concept of stamped reply forms so that opting out would be convenient for the consumer. In the final rule, the Board has deleted the reference to self-addressed and stamped, but has retained the example of a reply form in §716.7(a)(2)(ii)(B).

Several commenters wrote that they supported allowing opt outs by electronic means. The final rule retains this example in §716.7(a)(2)(ii)(C).

A few commenters recommended that the Board permit the consumer to opt out orally. Approximately 16 commenters requested that the final rule include an example of opt out by means of a toll-free telephone number. The final rule adds the example of a credit union providing a toll-free telephone number that consumers may call to opt out in §716.7(a)(2)(ii)(D).

The proposed rule stated that a credit union does not provide a reasonable means of opting out if it requires a consumer to send his or her own letter informing the credit union of the opt out election. One commenter supported this interpretation. Four commenters disagreed and wrote that the proposed rule goes beyond the GLB Act on this issue. The final rule retains this example in §716.7(a)(2)(iii)(A). The final rule also provides another example of an unreasonable means of opting out. This would be if the credit union describes in a subsequent opt out notice that a consumer may opt out by designating check-off boxes that were provided with the initial notice, but not included with the subsequent notice.

Several commenters requested that the Board provide that credit unions will be able to impose their own requirements on how consumers opt out. For example, a commenter requested that the Board permit credit unions to require customers to submit account numbers with an opt out request. The final rule provides that a credit union may require each consumer to opt out through a specific means, if it is reasonable for that consumer. 12 CFR §716.7(a)(2)(iv). The final rule provides that a

credit union may provide the opt out notice together with or on the same form as the initial notice. 12 CFR §716.7(b).

NCUA requested comment on how the right to opt out should apply to joint account holders and trustees of commingled trust accounts, where a trustee manages a single account on behalf of multiple beneficiaries. For the same reasons as in the discussion on initial notice under §716.4, approximately 50 commenters supported only requiring that the primary account holder get a right to opt out. A few commenters wrote that either party on a joint account should have the right to opt out. One commenter requested that, if one party to a joint account wants to opt out, the financial institution should honor his or her request. The final rule provides that the credit union need only provide one opt out notice to holders of accounts, other than loans, but that either party to the joint account may exercise an opt out direction. 12 CFR §716.7(d). The final rule provides that the credit union may treat the opt out direction by a joint consumer as applying to all of the associated joint consumers or permit each joint consumer to opt out separately. The final rule also provides an example. 12 CFR §716.7(d)(5).

With regard to application of the right to opt out to trustees, as previously discussed in connection with the definition of consumer, 12 CFR §716.3(e)(1), a credit union need not provide notice to both a consumer and a consumer's legal representative. Thus, a credit union may provide notice of the right to opt out to either the beneficiaries or their legal representative.

The proposed rule in §716.8(d) stated that a consumer has the right to opt out at

any time. The proposed rule also required that the sharing of nonpublic personal information stop promptly when the consumer opts out. Some commenters asked the Board to clarify in the final rule how long a credit union has after receiving an opt out to cease disclosing nonpublic personal information to nonaffiliated third parties. Several commenters requested that the rule provide no opt out rights once a sharing or affinity program has begun. Several commenters requested that the right to opt out should only affect disclosures after the consumer has opted out and should not apply retroactively. One commenter requested that the rule require a financial institution has to comply with a consumer's subsequent opt out within 30 days of his or her request.

The final rule retains the consumer's continuing right to opt out. 12 CFR §716.7(f). The final rule also requires the sharing of nonpublic personal information to stop as soon as reasonably practicable after the credit union receives the opt out direction. 12 CFR §716.7(e). NCUA, consistent with the other Agencies, believes that it is appropriate to retain this more general rule in light of the wide range of practices throughout the financial institutions industry. A potential drawback of a more prescriptive rule is that a credit union might use the standard as a safe harbor in all instances and thus fail to honor an opt out as early as it is otherwise capable of doing. Another drawback is that a standard that is set in light of current industry practices and capabilities is likely to become outmoded quickly as advances in technology increase efficiency. NCUA therefore declines to adopt a more rigid standard, and instead retains the rule as set out in §716.7(e) of the final rule.

The proposed rule in §716.8(e) stated that an opt out will continue until a

consumer revokes it in writing, or, if the consumer agrees, electronically. The final rule retains those requirements in §716.7(g). The final rule clarifies that when the member relationship terminates, the opt out direction continues to apply to information collected during the relationship. If the individual then enters into a new member relationship with the credit union, the former opt out direction does not apply to the new relationship. 12 CFR §716.7(g)(2). The final rule states that requirements for delivery of the opt out notices are found in §716.9. 12 CFR §716.7(h).

NCUA requested comment on the regulatory burden of complying with opt out notices. How do credit unions expect to give opt out opportunities? How many opt outs do credit unions expect to receive and need to process? Commenters who responded generally did not address these issues with specificity, but some stated that complying with the opt out notice requirements and directions will be burdensome.

Section 716.8 Revised privacy notices.

For ease of reference in the final rule, NCUA and the other Agencies are grouping the provisions concerning revised notices into one section. The proposed rule contained requirements that a credit union send a customer a new notice and opt out when there is a change in terms. A couple of commenters recommended eliminating these requirements. A couple of commenters recommended the Board revise the language to specify a "material" change in terms. One commenter wrote that when a financial institution changes its terms, a consumer's prior opt out should remain in effect for 30 days while he or she is permitted to consider the new right to opt out. NCUA and the other Agencies are retaining these requirements in the final rule as proposed, but

are adding an additional example. The new example provides that the credit union must provide a revised policy notice if it discloses nonpublic personal information to a nonaffiliated third party about a former customer who has not had the opportunity to exercise an opt out right regarding that disclosure. The final rule moves the requirements for delivery of the revised notices to §716.9.

Section 716.9 Delivering privacy and opt out notices.

In the proposed rule, the rules governing how credit unions must provide the initial and annual privacy notices and opt out notices were found in various sections depending on the type of notice. For ease of reference in the final rule, NCUA and the other Agencies are grouping the provisions concerning delivery of privacy and opt out notices into one section.

The proposed rule provided that the notices may be delivered in writing or, if the consumer agrees, electronically. The proposed rule required that the credit union provide the notices so that each recipient can reasonably be expected to receive actual notice. A few commenters objected to the requirement that the credit union must reasonably expect the customer will receive the notice. Their reasons were that this requirement is: not expressly stated in the statute, not consistent with other disclosure regulations, and burdensome. The final rule in §716.9(a) contains the requirements for any privacy notices and opt out notices, including short-form initial notices.

The proposed rule provided examples of acceptable methods of delivery of the notice to customers where the credit union may reasonably expect the customer will receive the notice. The Board requested comment on the regulatory burden of

providing the initial notice and the methods credit unions expect to use to provide the notice.

One commenter recommended the reference to sending the consumer an electronic mail notice be deleted because a preferable method would be for a customer to access the notice on a secure site. Several commenters requested that the regulation provide examples of other means of electronic delivery, such as posting the notice on the web and informing the consumer to access the site, or sending an electronic mail with a link to the notice. The final rule retains the examples of reasonable and unreasonable expectations of delivery in §716.9(b).

The proposed rule stated that oral notices alone are insufficient. A few commenters requested that oral notice be permitted where the financial institution establishes the customer relationship over the telephone. A few commenters objected that it would be costly to train staff to provide oral notices. The final rule retains the provision that oral notices alone are insufficient in §716.9(d).

Several commenters wrote that providing the annual notice will be burdensome and a waste of resources. One commenter requested that credit unions not be required to send the notice unless their policies have changed. Some commenters requested that the regulation permit the credit union to comply with the annual notice requirement by posting the notice on its web site. NCUA and the other Agencies agree with the commenters. For annual notices only, the final rule permits a credit union to reasonably expect a member to receive notice if the member uses the credit union's web site to access financial products and services electronically, agrees to receive notices there,

and the credit union posts the current privacy policy there in a clear and conspicuous manner. 12 CFR §716.9(c).

Several commenters requested that customers should be able to waive the right to receive the annual notice. Another commenter wrote that a credit union should be able to comply with the law by providing the policy to customers only upon their request. A couple of commenters requested that credit unions should not have to send the notice to customers who have opted out. The final rule permits the credit union to reasonably expect that a member will receive actual notice of the privacy notice if he or she has requested the credit union refrain from sending any information regarding the member relationship and the current policy remains available to the member upon request. 12 CFR §716.9(c).

The proposed rule in §716.4(g) required the credit union to provide the notice to the customer in a form that can be retained or obtained at a later time, in a written form or if the customer agrees, in electronic form. Some commenters supported the requirement for the notice to be retainable or obtainable and some opposed it as burdensome. A few commenters wrote that the Board should delete the requirement that the consumer must agree to the electronic form. One commenter suggested that the agreement should be implied if the customer initiates an electronic transaction.

NCUA requested comment on whether there are situations where providing notice by mail is impracticable. Several commenters suggested the credit union should not have to provide the notice by mail if the credit union does not have the customer's current address. Some commenters suggested that the credit union should not have to

provide the disclosures at all if it does not have the address or another way to contact the customer.

Section 716.9(e) of the final rule retains the requirement that the initial notice, annual notice, and any revised notice be given in a way so that the member may either retain them or access them at a later time and provides examples, such as mailing the notice to the last known address. NCUA acknowledges that, in some cases, credit unions will not have any means of delivery.

Subpart B-Limits on Disclosures

Section 716.10 Limits on disclosure of nonpublic personal information to nonaffiliated third parties.

NCUA and the other Agencies are moving the main operative provisions from §716.7 in the proposed rule to §716.10 in the final rule. The proposed rule in §716.7 required that a credit union give the consumer a reasonable opportunity to opt out before it discloses the consumer's information. The proposed rule provided an example that when a credit union has mailed a privacy notice to a customer, he or she will have 30 days to opt out. NCUA invited comment on whether 30 days is a reasonable opportunity to opt out in the case of notices sent by mail. Several commenters requested that NCUA remove the reference to 30 days. Several commenters wrote that 30 days was a reasonable time period. A few commenters recommended 15 days and one recommended 60 days. The final rule retains 30 days as an example of a reasonable period of time to allow the consumer to opt out by mailing a form, calling a

toll-free number, or any other reasonable means. 12 CFR §716.10(a)(3)(i).

NCUA also requested comment on whether an example in the context of transactions conducted using an electronic medium would be helpful. One commenter wrote that three days was a reasonable period for the consumer to opt out when the delivery of the notice was by electronic methods. A few commenters requested that the Board specify a uniform time frame as a reasonable opt out period, no matter how the credit union has delivered the notice. The Board agrees with these commenters. The final rule adds an example of reasonable opportunity to opt out by electronic means for a member who opens an on-line account with a credit union. If the credit union makes the notices available on its web site, the member may to opt out by any reasonable means within 30 days after the date he or she acknowledges receipt of a notice. 12 CFR §716.10(a)(3)(ii).

The proposed rule also provided an example of a reasonable method for the consumer to opt out in an isolated transaction. One commenter recommended not requiring the opt out to be a necessary part of the transaction. A couple of commenters recommended allowing the consumer to opt out at a later time by mail. The final rule retains the example from the proposed rule. 12 CFR §716.10(a)(3)(iii).

A couple of commenters requested that the Board clarify the description of partial opt outs. The Board believes the description is adequate and the final rule retains the description from the proposed rule. 12 CFR §716.10(c).

Section 716.11 Limits on redisclosure and reuse of information.

Section 716.12 of the proposed rule implemented the GLB Act's limitations on

redisclosure and reuse of nonpublic personal information about consumers. Section 502(c) provides that a nonaffiliated third party that receives nonpublic personal information from a financial institution shall not, directly or through an affiliate of the third party, disclose the information to any person that is not affiliated with either the financial institution or the third party, unless the disclosure would be lawful if made directly by the financial institution. The final rule revises the language and adds examples.

Paragraph (a)(1) of the proposed rule set out the GLB Act's redisclosure limitation as it applies to a credit union that receives information from another financial institution. Paragraph (b)(1) of the proposed rule mirrored the provisions of paragraph (a)(1), but applied the redisclosure limits to any nonaffiliated third party that receives nonpublic personal information from a credit union.

The Board requested comment on whether subsequent disclosures by the third party to parties other than the credit union are lawful. One commenter wrote that no third party reuse should be allowed. Approximately 11 commenters thought some reuse by third parties should be allowed as permitted by law or the exceptions.

Some of these commenters criticized imposing limits on reuse premised on the conclusion that Congress, by addressing limits on redisclosures in section 502(c) of the GLB Act, provided the only limits that may be imposed on what a recipient of nonpublic personal information can do with that information. The Board, consistent with the other Agencies, disagrees with that premise. Section 502(c) is silent on the question of reuse, making it necessary to look to the overall purpose of the statute to determine

whether the Board should impose limits on the ability of nonaffiliated third parties to reuse nonpublic personal information that they receive from a credit union. The Board, consistent with the other Agencies, believes that the overall purposes of subpart A of Title V of the Act makes it appropriate to impose limits on reuse, depending on whether the information was obtained pursuant to one of the exceptions in section 502(e) of the GLB Act (as implemented by §§716.14 and 716.15 of the final rule).

When disclosures are made in connection with one of the purposes set out in section 502(e), those disclosures are exempt from the notice and opt out protections altogether. A consumer has no right to prohibit those disclosures or even to know more than the financial institution is making the disclosures "as permitted by law." The only protection afforded by the statute for disclosures made under section 502(e) is the limited nature of the exceptions. The Board believes it would be inappropriate to undermine the protection by allowing the recipient of nonpublic personal information to reuse the information for any purpose, including marketing.

By contrast, when a consumer decides not to opt out after being given adequate notices and the opportunity to do so, that consumer has made a decision to permit the sharing of his or her nonpublic personal information to the categories of entities identified in the financial institution's notices. The consumer's primary protection in the case of a disclosure falling outside the 502(e) exceptions comes from receiving the mandatory disclosures and the right to opt out. The statute provides only the additional protection in section 502(c), restricting a recipient's ability to redisclose information to entities that are not affiliated with either the recipient or the financial institution making

the disclosure initially. Thus, if a consumer permits a financial institution to disclose nonpublic personal information to the categories of nonaffiliated third parties that are described in the institution's notices, recipients of that nonpublic personal information appear authorized under the statute to make disclosures that comply with those notices.

To implement this statutory scheme, the Board, consistent with the other Agencies, has retained a limit on reuse in addition to the limit on redisclosures. The final rule addresses a credit union's disclosure of the information it receives from a financial institution to: the credit union's own affiliates, the financial institution's affiliates, and others. A credit union may disclose the information to its affiliates who, in turn, may disclose and use the information only to the same extent as the credit union. Second, a credit union may disclose the information to the affiliates of the financial institution from whom the credit union received the information. Third, a credit union may disclose and use the information pursuant to the exceptions under §§716.14 and 716.15. The limits on redisclosure and reuse that apply to recipients of information and their affiliates will vary, depending on whether the information was provided pursuant to one of the exceptions in §§716.14 and 716.15.

If a credit union received the nonpublic personal information from a financial institution pursuant to an exception under §§716.14 and 716.15, the credit union may disclose the information to its affiliates or to affiliates of the financial institution from which the information was received. In addition, the credit union may disclose and use the information pursuant to an exception in §716.14 or 716.15 in the ordinary course of

business to carry out the activity covered by that exception. 12 CFR §716.11(a)(1)(iii). An example of this is if a credit union performs correspondent services for another credit union and receives a list containing member information, the credit union performing the services may disclose the list in response to a subpoena or to its attorneys, accountants, or auditors. The credit union could not use the list for its own marketing or disclose the list to a third party for marketing. The credit union's affiliates may disclose and use the information, but only to the extent permissible for the credit union.

If a credit union received the nonpublic personal information from a financial institution other than pursuant to an exception under §716.14 or 716.15, the credit union may disclose the information to its affiliates or to the affiliates of the financial institution that made the initial disclosure. In addition, the credit union may disclose the information to any other person if the disclosure would be lawful if the financial institution made the disclosure directly to that person. The final rule also provides an example. The credit union may disclose a list it receives from a financial institution to another nonaffiliated third party only if the financial institution could have lawfully disclosed it to the nonaffiliated third party. The credit union may disclose the list in accordance with the privacy policy of the financial institution, as limited by the opt out directions of each consumer whose information the credit union intends to disclose. The affiliates of the credit union may disclose the information only to the extent that the credit union may disclose the information.

The Board requested comment on whether the rule should require a credit union

that discloses nonpublic personal information to a nonaffiliated third party to develop policies and procedures to ensure that the third party complies with the limits on redisclosure of that information. Approximately 25 commenters thought that the credit union should not be responsible for third party compliance because it would be burdensome and unnecessary. A few commenters replied that financial institutions should develop policies and procedures on third party compliance. A few commenters wrote that the Board should suggest confidentiality agreements between credit unions and vendors. One commenter suggested that a credit union should use due diligence when selecting the third party.

The Board, consistent with the other Agencies, has given these comments due consideration and §716.11 of the final rule does not impose a specific duty on credit unions to monitor third parties' use of nonpublic personal information provided by the credit unions. The Board notes, however, that credit unions may have contracts in place that limit what the recipient may do with the information. The Board also notes that the limits on reuse as stated in the final rule provide a basis for an action to be brought against an entity that violates those limits.

Paragraphs (c) and (d) of the final rule mirror the provisions of paragraphs (a) and (b) of the final rule. The same general redisclosure and reuse limits apply to any nonaffiliated financial institution that receives nonpublic personal information from a credit union as would apply to a credit union that receives such information from a nonaffiliated financial institution.

Section 716.12 Limits on sharing of account number information for marketing

purposes.

Section 502(d) of the GLB Act prohibits a financial institution from disclosing, other than to a consumer reporting agency, an account number or similar form of access number or access code for a credit card account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer. Proposed §716.13 restated this statutory prohibition with minor stylistic changes intended to make the rule easier to read.

A few commenters recommended that the Board clarify that these limits only apply to credit card accounts, transaction accounts and deposit accounts. Several commenters requested that the Agencies provide a definition and specific examples of a transaction account. A few commenters requested confirmation that transaction accounts do not include mortgage accounts or insurance accounts. The final rule clarifies that a transaction account is an account other than a share account or credit card account, and does not include an account to which a third party cannot initiate a charge. 12 CFR §716.12(c)(2).

The Board also requested comment on whether a flat prohibition would disrupt routine, unobjectionable practices. Several commenters were concerned that it would disrupt the practices of a service provider who prepares and distributes monthly credit union statements and includes literature about products with the statement. Approximately 18 commenters requested that the Board clarify that the scope of the prohibition is narrow. One commenter requested that the Agencies adopt this rule

unchanged from the proposed and not add any exceptions.

The commenters requested clarification that the limits on sharing do not apply to a financial institution itself or those acting on behalf of the financial institution. Some credit unions noted that they use agents or service providers to conduct marketing on the credit union's behalf. This might occur, for instance, when a credit union instructs a service provider that assists in the delivery of monthly statements to include a "statement stuffer" with the statement informing consumers about a financial product or service offered by the credit union. NCUA, consistent with the other Agencies, recognizes the need to disclose account numbers in this instance, and believes that there is little risk to the consumer presented by such disclosure. Similarly, NCUA recognizes that a credit union may use agents to market the credit union's own financial products and services. Commenters advocating that the final rule exclude disclosures to agents stated that the agents effectively act as the credit union in the marketing of its financial products and services. These commenters suggested that there was no more reason to preclude sharing the account numbers with an agent hired to market the credit union's financial products and services than there would be to preclude sharing between two departments of the same credit union.

The final rule provides for an exception to the prohibition on account number disclosure to the credit union's agent or service provider solely in order to perform marketing for the credit union's products or services, as long as the agent or service provider cannot directly initiate charges to the account. 12 CFR §716.12(b)(1).

The Board requested comment on whether the GLB Act prohibits a credit union

from disclosing encrypted account numbers to a marketing firm if the credit union does not provide the key to the marketer. The Board also requested comment on whether an exception could avoid creating risks that may arise when a third party is provided access to a consumer's account. Approximately 21 commenters requested that the rule permit a financial institution to disclose an encrypted, truncated, scrambled, reference, or similarly coded form number to identify a customer. NCUA, consistent with the other Agencies, believes that consumers will be adequately protected by disclosures of encrypted account numbers that do not enable the recipient to access the consumer's account. The final rule provides a negative example that an account number, or similar form of access number or code, does not include a number or code in an encrypted form, if the credit union does not provide the recipient with a means to decode the number or code. 12 CFR §716.12(c)(1).

The Board also requested comment on whether a consumer should be able to consent to the disclosure of his or her account number and what standards should apply. All of the approximately ten commenters who commented on this issue wrote that the regulation should state that a consumer may consent to disclosure. A few commenters requested that the rule permit credit unions to share a customer's account number with a third party if the customer actually purchases the marketed product. The final rule addresses consumer consent in §716.15, and does not address it again in this section.

Several commenters requested that a credit union should be able to disclose an account number to a participant in a private label credit card program or an affinity or

similar program where participants are identified to the member when the member enters the program. Under these programs, a consumer typically will be offered certain benefits, often by a retail merchant, in return for using a credit card that is issued by a particular financial institution. In the example of a private label credit card, the consumer understands the need for the merchant and the financial institution to share the consumer's account number. The NCUA and the other Agencies believe this sort of disclosure is appropriate and does not create a significant risk to the consumer. The final rule provides for this exception in §716.12(b)(2) where the participants are identified to the consumer at the time the consumer enters into the program.

Subpart C-Exceptions

Section 716.13 Exception to opt out requirements for service providers and joint marketing.

Section 502(b) of the GLB Act creates an exception to the opt out rules for the disclosure of information to service providers and for marketing. A consumer will not have the right to opt out of disclosing nonpublic personal information to nonaffiliated third parties under these circumstances, if the credit union satisfies certain requirements. Section 502(b) of the GLB Act provides that the financial institution must "fully disclose" to the consumer that it will provide this information to the nonaffiliated third party before the information is shared. This disclosure should be provided as part of the initial notice that is required by §716.4. NCUA invited comment on whether the proposed rule in §716.9 appropriately implemented the requirement of "full" disclosure.

A couple of commenters suggested that consumers should be fully informed of the parties to the joint marketing agreements. One supported this approach so that members can report abuses to NCUA. Another commenter opposed specific, separate disclosures for joint marketing agreements. The Board believes that the notice requirement as proposed satisfies the full disclosure requirement of the GLB Act and, therefore, retains the same notice requirement in the final rule.

The GLB Act allows the Agencies to impose requirements on the disclosure of information pursuant to the exception for service providers beyond those imposed in the statute. NCUA, like the other Agencies, did not do so in the proposed rules, but invited comment on whether additional requirements should be imposed, and, if so, what those requirements should address. Approximately ten commenters wrote that the Agencies should reconsider this exception for opt out requirements for service providers and also eliminate the notice requirement. These commenters wrote that the notice and contract requirements under §502(b) should not apply to outsourcing arrangements where the third party agent, processor or server is performing operational functions on behalf of the credit union. They requested that service providers instead should be exempt from notice and opt out requirements under the §716.10 exception. The final rule in §716.13 retains application of this section to service providers because it is statutory.

One commenter requested that the Agencies provide examples of this service provider exception. The exception would apply, for example, to service providers whose services are not necessary in order for the credit union to provide financial services or products to consumers. The final rule provides a new example, that if a

credit union discloses nonpublic personal information to a financial institution with whom it performs joint marketing, the contract must prohibit the institution from disclosing or using the information except as necessary to carry out the joint marketing or under an exception in §716.14 or 716.15 in the ordinary course of business to carry out that marketing.

The proposed rule in section §716.9 required the credit union to enter into a contract with the third party that requires the third party to maintain the confidentiality of the information. Several commenters requested that the Board exempt existing contracts from the requirement of the confidentiality provision or extend the time frame for existing contracts to comply. The final rule provides a two-year grandfather period for service agreements entered into before July 1, 2000, under §716.18(c).

The proposed rule in §716.9 provided that the contract should require the third party: (i) to maintain the confidentiality of the information at least to the same extent as is required for the credit union; and (ii) to use the information solely for the purposes for which the information is disclosed or as otherwise permitted by the exceptions in §§716.10 and 716.11 of the proposed rule. The final rule in §716.13 deletes the first provision as redundant and clarifies that the use under the exceptions (§§716.14 and 716.15 of the final rule) is in the ordinary course of business to carry out the purposes for which the credit union disclosed the information.

The Board requested comment on the application of the exception to credit unions that contract with credit scoring vendors to evaluate borrower creditworthiness. Approximately nine commenters responded that the exception should be interpreted so

that it does not inhibit credit scoring, market response, or consumer behavioral models.

NCUA sought comment on whether the rule should require a credit union to take steps to assure itself that the product being jointly marketed and the other participants in the joint marketing agreement do not present undue risks for the credit union. Several commenters opposed the Board requiring credit unions to take steps to ensure that the products and participants do not present undue risks. One commenter wrote that Letter to Credit Unions No. 150 already provides adequate protection against undue risks. One commenter supported the credit unions taking steps against undue risks. The final rule does not add new requirements to ensure against undue risks.

Section 716.14 Exceptions to notice and opt out requirements for processing and servicing transactions.

The proposed rule in §716.13 set out certain exceptions for disclosures of nonpublic personal information in connection with the administration, processing, servicing, and sale of a consumer's account. One commenter suggested the Board should apply the exception in cases where the use of information is for the benefit of the credit union and not the third party. Several commenters requested that the Board make the rule consistent with the plain language of the GLB Act and use the terms "in connection with," not "required" for servicing. NCUA and the other Agencies agree with the commenters. NCUA has made stylistic changes and has revised its use of the terms "in connection with" in the final rule. NCUA has also deleted the reference to underwriting insurance at the consumer's request or for reinsurance purposes, because credit unions do not engage directly in those activities.

Several of the commenters requested that the Board broaden the exception and clarify the definition and list examples of servicing transactions. Approximately ten commenters requested that the Board clarify that the exceptions should include collection activities or products or services associated with a loan, such as those to protect collateral securing a loan. Commenters also recommended adding other examples to the list of exceptions, such as private label credit cards, electronic funds transfer transactions, statement mailing, ATMs, mechanical breakdown insurance, gap insurance on leasing, and one credit union phoning another to check on available funds before depositing a check drawn on the other credit union. Some of these examples have been included and the Board believes they are sufficiently illustrative of transactions that would qualify as servicing transactions.

Section 716.15 Other exceptions to notice and opt out requirements.

The proposed rule in §716.11 set out other exceptions, not made in connection with the administration, processing, servicing, and sale of a consumer's account. One of the exceptions was for disclosures made with the consent or at the direction of the consumer. The Board requested comment whether it should add safeguards to this exception to minimize the potential for consumer confusion. One commenter recommended that the Agencies not allow the consumer consent provision to be a way to evade the notice and opt out in the rest of the GLB Act.

Several commenters wrote that the consumer consent requirement should be a flexible requirement that the consumer can exercise by phone, email, or Internet. A few commenters requested that the Agencies eliminate the consent requirement. A couple

of commenters wrote that the exception should permit implied consent.

Approximately ten commenters wrote that the consent exception should permit financial institutions to share nonpublic personal information about consumers with third parties with whom they have co-branding and affinity relationships. For example, in these cases, the name of a third party who is the provider of a financial product is prominently displayed on credit cards or private label cards. If the third party is a financial institution, the proposed rule already provided an exception to the opt out requirement. Commenters requested that the same exception should also apply where the third party is not a financial institution. Commenters wrote that an opt out requirement would be burdensome and would delay providing customers the benefits they expect to receive.

After considering these comments, the NCUA and the other Agencies have decided to adopt this section of the final rule in §716.15 virtually as proposed in §716.11. However, the NCUA and the other Agencies are changing the reference in the proposed rule from government regulator to federal functional regulator, the Secretary of Treasury, a state insurance authority, and the Federal Trade Commission.

Subpart D-Relation to Other Laws; Effective Date

Section 716.16 Protection of Fair Credit Reporting Act

The Agencies and NCUA are adopting §716.16 as proposed in §716.15.

Section 716.17 Relation to state laws.

Section 507 of the GLB Act states that Title V does not preempt any state law

that provides greater protections than are provided by Title V. Determinations of whether a state law or Title V provides greater protections are to be made by the Federal Trade Commission after consultation with the agency that regulates either the party filing a complaint or the credit union about whom the complaint was filed. Determinations of whether state or federal law afford greater protections may be initiated by any interested party or on the Federal Trade Commission's own motion.

Proposed §716.15 was substantively identical to section 507. Although statutorily mandated, many commenters felt compelled to note the hardship, if not impossibility, it will be for financial institutions to comply with the federal regulation and the many different state laws that may apply to them. The difficulties include: when to follow state law; what state law to follow; and redesigning computer systems to take into account the different requirements.

One commenter suggested that "federal credit unions may be subject to a state compliance examination" in states where state law is controlling. The Board would treat compliance by a federal credit union with a state privacy law the same as it treats a federal credit union's compliance with other controlling state law. The NCUA will coordinate with the appropriate state regulator to ensure that a federal credit union is in compliance with the controlling state privacy provisions.

Section 716.18 Effective date; transition rule.

Section 510 of the GLB Act states that, as a general rule, the relevant provisions of Title V take effect 6 months after the date on which rules are required to be prescribed. However, section 510(1) authorizes the Agencies to prescribe a later date

in the rules enacted pursuant to section 504.

Proposed §716.16(a) had an effective date of November 13, 2000. NCUA invited comment on whether six months following adoption of final rules was sufficient to enable credit unions to comply with the rules. Fifty-four of the 55 commenters that commented on this provision requested that the effective date for mandatory compliance be extended. The sole dissenting commenter was the Congressional Privacy Caucus.

The Congressional Privacy Caucus' rationale was that six months is sufficient time for financial institutions to comply. The other 54 commenters offered a variety of reasons why six months is not sufficient. Some of the reasons in support of extending the compliance date were: operationally and financially it is a burden for financial institutions because they must identify customers and consumers and the sources and uses of consumer information, train staff, prepare disclosure statement and reprogram computers; prompt corrective action compliance, Y2K compliance and end of year timing, all make this a difficult period for credit unions to comply; credit unions would not be able to include the disclosure with their annual statements; this is the holiday season which is a busy time for the members and the post office; this was not budgeted for in the 2000 budget; and Congress gave the Agencies authority to extend the compliance date. Some commenters noted that, if financial institutions are required to rush compliance, there is a much greater likelihood of mistakes.

The Board agrees that six months after publication of the final rule may be insufficient time in certain instances for a credit union to ensure that its forms, systems,

and procedures comply with the rule. In order to accommodate situations requiring additional time, the Board retained the effective date of November 13, 2000, but, consistent with its authority under section 510(1) of the GLB Act to extend the effective date, the Board will give credit unions until July 1, 2001 to be in full compliance with the regulation.

Credit unions are expected, however, to begin compliance efforts promptly, to use the period prior to June 30, 2001, to implement and test their systems, and be in full compliance by July 1, 2001. Given that this provides credit unions with slightly over 13 months in which to comply with the rule, the Board has determined that there no longer is any need for a separate phase-in for providing initial notices. Thus, a credit union will need to deliver all required opt out notices and initial notices before July 1, 2001. The final rule provides a new example that the credit union provides an initial notice to consumers who are members as of July 1, 2001, if by that date, it has established a system for providing initial notice to all new members and has mailed the initial notice to all existing members.

Credit unions are encouraged to provide disclosures as soon as practicable. Depending on the readiness of a credit union to process opt out elections, credit unions might wish to consider including the privacy and opt out notices in the same mailing as is used to provide tax information to members in the first quarter of 2001 to increase the likelihood that a member will not mistake the notices for an unwanted solicitation. The Board believes that this extension represents a fair balance between those seeking prompt implementation of the protections afforded by the statute and those concerned

about the reliability of the systems that are put in place.

In response to a concern by some commenters that existing service contracts may not comply with §716.13(a)(2) of the final rule, the NCUA and the other Agencies are agreeing to postpone the mandatory compliance date for existing third party service contracts to state that the third party agrees to maintain the confidentiality of nonpublic personal information, until July 1, 2002. All third party service contracts entered into after July 1, 2000, however, must comply with the requirement.

Appendix A

Approximately 19 commenters requested that the Agencies provide sample or model disclosure forms of the notice. The Board, consistent with the other Agencies, has provided sample disclosure language in Appendix A to its final rule. The Board urges credit unions to carefully review whether these clauses accurately reflect a given credit union's policies and practices before using the clauses. Credit unions are free to use different language and to include as much detail as they think is appropriate in their notices.

The sample clauses are intended to minimize the burden and costs to credit unions, including small credit unions. This is especially true for small credit unions that only share nonpublic personal information with nonaffiliated third parties pursuant to the exceptions provided in §§716.14 and 716.15. These credit unions may provide relatively simple initial and annual notices to members.

III. Regulatory Procedures

A. Paperwork Reduction Act

NCUA has submitted the reporting requirements in Parts 716 and 741 to the Office of Management and Budget and is awaiting approval and issuance of a new OMB control number (3133-____). Approximately 20 commenters wrote that this regulation will result in increased costs. Several commenters also wrote that there will be increased paperwork burden. Commenters cited dollar amounts from $500 to ten million dollars, for system changes, staff hours, and mailing costs. A few commenters wrote that the cost may depend on what their vendors will charge to upgrade their systems. One commenter wrote that there would be no increased costs. Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB number. The control number will be displayed in the table at 12 CFR part 795.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires, subject to certain exceptions, that NCUA prepare an initial regulatory flexibility analysis (IRFA) with a proposed rule and a final regulatory flexibility analysis (FRFA) with a final rule, unless NCUA certifies that the rule will not have a significant economic impact on a substantial number of small credit unions. For purposes of the Regulatory Flexibility Act, and in accordance with NCUA's authority under 5 U.S.C. 601(4), NCUA has determined that small credit unions are those with less than one million dollars in assets. See 12 CFR

§791.8(a). NCUA's final rule will apply to approximately 1,626 small credit unions, out of a total of approximately 10,627 federally-insured credit unions.

At the time of issuance of the proposed rule, NCUA could not make such a determination for certification. Therefore, NCUA issued an IRFA pursuant to section 603 of the Regulatory Flexibility Act. After reviewing the comments submitted in response to the proposed rule, NCUA believes that it does not have sufficient information to determine whether the final rule would have a significant economic impact on a substantial number of small credit unions. Therefore, pursuant to section 604 of the Regulatory Flexibility Act, NCUA provides the following FRFA.

This FRFA incorporates NCUA's initial findings, as set forth in the IRFA; addresses the comments submitted in response to the IRFA; and describes the steps NCUA has taken in the final rule to minimize the impact on small entities, consistent with the objectives of the GLB Act. Also, in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), NCUA will in the near future issue a Small Credit Union Compliance Guide to assist small credit unions in complying with this rule.

1. Statement of the Need and Objectives of the Rule. The final rule implements the provisions of Title V, Subtitle A of the GLB Act addressing consumer privacy. In general, these statutory provisions require financial institutions to provide notice to

consumers about an institution's privacy policies and practices, restrict institutions from sharing nonpublic personal information about consumers with nonaffiliated third parties, and permit consumers to prevent institutions from disclosing nonpublic personal information about them to certain nonaffiliated third parties by "opting out" of that disclosure. Section 504 of the GLB Act requires NCUA and the other Agencies, in consultation with representatives of state insurance authorities, to prescribe "such regulations as may be necessary" to carry out the purposes of Title V, Subtitle A. NCUA believes that the final rule gives credit unions greater certainty on how to comply with the statute.

2. Summary of Significant Issues Raised in Public Comments and Assessment of Issues. NCUA does not have a practicable or reliable basis for quantifying the costs of the proposed rule or any alternatives, but sought comment on the potential costs. NCUA specifically requested information on the costs of creating privacy policy disclosures, distributing privacy policy disclosures, implementing "opt out" disclosure and processing requirements, and complying with the proposed rule in its entirety.

The comments varied, and were not specific to small credit unions. Approximately 20 commenters wrote that this regulation will result in increased costs. Commenters cited dollar amounts from $500 to ten million dollars, for system changes, staff hours, and mailing costs. A few commenters wrote that the cost may depend on what their vendors will charge to upgrade their systems. One commenter wrote that there would be no increased costs.

After considering the comments received, NCUA does not have a practicable or reliable basis for quantifying the costs of implementing the requirements of the GLB Act. We expect that compliance costs will vary significantly between credit unions depending on information sharing practices.

NCUA believes that the new compliance requirements will indeed create additional economic costs for some credit unions, especially those that choose to disclose information to nonaffiliated third parties. Most, if not, all of these costs result from requirements expressly mandated by the GLB Act. These costs include, but are not limited to: (1) reviewing current information sharing practices; (2) determining operational and computer programming changes necessary; (3) identifying sources and uses of member information; (4) preparing disclosure forms; and (5) training staff. Credit unions that disclose nonpublic personal information about consumers to nonaffiliated third parties will be required to provide opt out notices to consumers, as well as a reasonable opportunity to opt out of certain disclosures. These credit unions will have to develop systems for keeping track of consumers' opt out directions. Some credit unions, particularly those that disclose nonpublic information about consumers to nonaffiliated third parties, may need the advice of legal counsel to ensure that they comply with the rule.

However, NCUA continues to believe that the costs of implementing the opt out provisions of the final rule will be insubstantial for credit unions that do not disclose nonpublic personal information about consumers to nonaffiliated third parties. These credit unions may provide relatively simple initial and annual notices to consumers with

whom they establish member relationships. However, NCUA cannot determine either the number or identity of credit unions that will not disclose nonpublic personal information about consumers to nonaffiliated third parties.

In the IRFA, NCUA recognized that the Congressional Conferees on the Act wished to ensure that smaller financial institutions are not placed at a competitive disadvantage by a statutory regime that permits certain information to be shared freely within an affiliate structure while limiting the ability to share that same information with nonaffiliated third parties. The Conferees stated that, in prescribing regulations, the federal regulatory agencies should take into consideration any adverse competitive effects upon small commercial banks, thrifts, and credit unions. See H.R. Conf. Rep. No. 106-434, at 173 (1999).

Accordingly, NCUA also sought comment on whether the requirements of the Act and this rule will create additional burden for small credit unions, particularly those that disclose nonpublic personal information about consumers to nonaffiliated third parties. In connection with any such burden, NCUA requested comment on whether any exemptions for small credit unions would be appropriate. A few commenters suggested that small credit unions not have to provide opt out notices, but those suggestions were not consistent with the objectives of the GLB Act. Although NCUA could exempt small credit unions from providing a notice and opportunity for consumers to opt out of certain information disclosures, NCUA does not believe that such an exemption would be appropriate, given the purpose of the Act to protect the confidentiality and security of nonpublic personal information about consumers.

Several commenters noted that small credit unions are penalized by the definition of “control” in the rule. The Board has added an example to the definition of control that will assist small credit unions.

Further, NCUA, consistent with the other Agencies, has revised some of the requirements in the final rule so that they are less burdensome. The discussion below reviews some of the other significant changes:

a. Sample disclosure clauses (Appendix A to Part 716) and Compliance Guide for Certain Credit Unions (Supplementary Information, Part V). Many commenters expressed concern over the amount of detail that appears to be required in both initial and annual notices. In addition, many of the commenters requested model forms for guidance as to the level of detail required. NCUA did not intend for the disclosures to be overly detailed and thus, burdensome for credit unions and potentially overwhelming for consumers. In response to these comments, Appendix A to Part 716 contains sample clauses to clarify the level of detail that NCUA believes is necessary and appropriate to be consistent with the statute.

NCUA has also provided additional assistance under the caption “Guidance for Certain Credit Unions” (Guidance). Supplementary Information, Part V. The Guidance generally clarifies the operation of the final rule. It also provides an example of a notice for small credit unions that only share nonpublic personal information with nonaffiliated third parties pursuant to the exceptions provided in §§716.14 and 716.15. The Guidance may be used in conjunction with the sample clauses contained in Appendix

A.

The sample clauses under Appendix A and the Guidance are intended to minimize the burden and costs to credit unions, including small credit unions. This is especially true for small credit unions that only share nonpublic personal information with nonaffiliated third parties pursuant to the exceptions provided in §§716.14 and 716.15. These credit unions may provide relatively simple initial and annual notices to members.

b. Definition of nonpublic personal information. In the preamble to the proposed rule, NCUA offered for comment two alternatives for defining nonpublic personal information. The first, (Alternative A) deemed information as publicly available only if a credit union actually obtained the information from a public source, whereas the second (Alternative B) treated information as publicly available if a credit union could obtain it from such a source. A significant majority of commenters favored Alternative B. Many commenters suggested that implementing Alternative A would be overly burdensome. Credit unions would have to develop some sort of methodology to distinguish between information obtained from consumers, versus information obtained through public sources. In response to these comments, the final rule adopts a modified version of Alternative B (refer to Section-by-section analysis for additional information) that treats information as publicly available if a credit union could obtain the information from a public source. The final rule addresses the concerns of credit unions—including small credit unions—by adopting the least economically burdensome

definition of nonpublic personal information.

c. Effective date. Section 510 of the GLB Act states that, as a general rule, the relevant provisions of Title V take effect six months after the date on which rules are required to be prescribed, i.e., November 12, 2000. However, section 510(1) authorizes the NCUA and the other Agencies to prescribe a later date in the rules enacted pursuant to section 504. The proposed rule sought comment on the effective date prescribed by the statute. The overwhelming majority of commenters requested additional time to comply with the final rule. Several commenters noted that credit unions may encounter difficulty managing the expenses and resources required to comply with the final rule as the credit union's budget for the current year was established prior to the issuance of the proposed regulation. This may be especially true for small credit unions that face already tight budgetary constraints due to heightened competition. In response to these concerns, NCUA has retained the effective date of November 13, 2000, but, consistent with its authority under section 510(1) of the GLB Act to extend the effective date, NCUA will give credit unions until July 1, 2001 to be in full compliance with the regulation. This additional time will allow credit unions to properly budget for any necessary expenses and staff resources required to comply with this rule and to make all necessary operational changes.

d. New notices not required for each new financial product or service. Some commenters expressed concern that the proposed rule may require a new initial

notice each time a consumer obtains a new financial product or service. This would be especially burdensome for credit unions that adopt a universal privacy policy that covers multiple products and services. To address these concerns and minimize economic burden, the final rule was clarified to instruct credit unions that a new initial notice is not required if the credit union has given its initial notice to the member, and that initial notice remains accurate with respect to the new product or service.

e. Short form initial notice for consumers. In the proposed rule, credit unions were required to provide consumers a copy of a credit union's complete initial notice even when there is no member relationship. NCUA agrees with commenters that suggested that the statute's objectives for the initial notice requirements could be achieved in a less burdensome way. Therefore, NCUA has exercised its exemptive authority as provided in section 504(b) to create an exception to the general rule that otherwise requires a credit union to provide a consumer with both the initial and opt out notices before disclosing nonpublic personal information about that consumer to nonaffiliated third parties. A credit union may provide a "short-form" initial notice along with the opt out notice to a consumer with whom the credit union does not have a member relationship. This short-form notice must state that the disclosure containing information about the credit union's privacy policies and practices is available upon request and provide one or more reasonable means by which the consumer may obtain a copy of the notice. This provision in the final rule will lessen the burden on credit

unions, including small credit unions.

3. Steps to Minimize the Significant Economic Impact on Small Entities Consistent with the Objectives of the GLB Act. The objectives of Title V of the GLB Act are that each financial institution has an affirmative and continuing obligation to respect the privacy of its consumers and to protect the security and confidentiality of those consumers' nonpublic personal information. NCUA carefully considered comments that suggested a variety of alternatives that could minimize the economic and overall burden of complying with the final rule. As stated above, NCUA has made changes to the proposal as a result of the comments that it hopes will ease the burden for small credit unions.

Nonetheless, the statute does not authorize the NCUA to create exemptions from the GLB Act based on a credit union's size or to mandate different compliance standards for small credit unions. The rule applies to all federally-insured credit unions, regardless of size. Moreover, different compliance standards would be inconsistent with the purposes of the GLB Act.

NCUA believes that the burden is relatively small for credit unions that only disclose nonpublic personal information about consumers to nonaffiliated third parties pursuant to the exceptions provided under §§716.14 and 716.15. NCUA's determination is based on an analysis of comments received in response to the proposed rule. These credit unions may provide relatively simple initial and annual notices to consumers with whom they establish member relationships. At this time, it is

not clear if information-sharing among affiliates in large institutional entities will place small credit unions at a disadvantage. NCUA believes that further experience under the regulation would be appropriate before considering any exemptions in this area for small credit unions.

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This final rule will apply to all federally-insured credit unions, but it will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Section 507 of the GLB Act states that state law may provide greater consumer protections than this proposed rule. In that event, federal law would not preempt state law. NCUA has determined the proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the

Administrative Procedures Act. 5 U.S.C. 551. NCUA has recommended to The Office of Management and Budget that it determine that this is not a major rule, and is awaiting its determination.

E. The Treasury and General Government Appropriations Act, 1999 - - Assessment of Federal Regulations and Policies on Families

NCUA has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

IV. Agency Regulatory Goal

NCUA's goal is clear, understandable regulations that impose minimal regulatory burden. Some commenters responded that the rule is not understandable and intrusive if implemented as proposed. The majority of the commenters did not address this issue.

V. Guidance for Certain Credit Unions

To minimize the burden and costs to a credit union and generally clarify the operation of the final rule, NCUA and the other Agencies are including this compliance guide that may be used in conjunction with the sample clauses contained in Appendix A. This guide specifically applies to a credit union that: (1) does not have any affiliates; only discloses nonpublic personal information to nonaffiliated third parties in

accordance with an exception under §§716.14 and 716.15, such as in connection with servicing or processing a financial product or service that a consumer requests or authorizes; and (3) does not intend to reserve the right to disclose nonpublic personal information to nonaffiliated third parties, except under §§716.14 and 716.15.[1]

In general, if a credit union discloses nonpublic personal information to nonaffiliated third parties only as authorized under an exception, then that credit union's only responsibilities under the regulation are to provide an initial and annual notice of its privacy policies and practices to each of its members. The credit union is not required to provide an opt out notice to its member.

A. Initial notice to members. A credit union must provide a notice of its policies and practices to each of its members. A member is a natural person who has a continuing relationship with a credit union, as described in §716.4(c). For instance, an individual who is accepted for membership under the credit union's bylaws is a member of that credit union. By contrast, an individual who uses a credit union's ATM to withdraw funds from a checking account maintained at another financial institution is not a member of that credit union. Even if an individual repeatedly uses a credit union's ATM that individual is not the credit union's member. In other words, the credit union is obligated to provide an initial and annual notices to each of its own members, but not its

[1] A credit union that discloses or reserves the right to disclose nonpublic personal information to a nonaffiliated third party under other circumstances must comply with other provisions in the rule, notably §§716.7,716.8, and 716.13, if applicable. A credit union that discloses or reserves the right to disclose nonpublic personal information to an affiliate must comply with other provisions in the rule, notably §716.6(a)(7), if applicable.

consumers.

B. Time to provide initial notice. A credit union must provide a notice of its policies and practices to each of its members not later than when it establishes a member relationship (§716.4(a)(1)). For instance, a credit union must provide a notice to an individual not later than when he or she is accepted for membership. Thus, a credit union can provide the notice to a potential member together with the membership agreement and signature card.

If an existing member of a credit union obtains a new financial product or service from it, that credit union need not provide another initial notice to him or her (§716.4(d)) if the initial notice has covered the subsequent product.

For instance, if Alison Individual walks into Credit Union for the first time on July 2, 2001, to apply for membership and open a share account, Credit Union complies with this provision of the rule if it provides an initial notice to Alison together with the documents that constitute the contract for membership and the share account. When Alison is accepted for membership and opens her account on that day, she becomes a member of Credit Union. Allison maintains her membership and, six months later, returns to Credit Union to obtain a loan. If the initial notice that Credit Union provided to Alison was accurate when she became a member and opened her account, then Credit Union need not provide another initial notice to her when she obtains the loan because it has provided the notice to Allison when she became a member.

C. Method of providing the initial notice. A credit union must provide its initial

notice so that each member can reasonably be expected to receive actual notice, in writing, of its privacy policies and practices (§716.9(a)). For example, a credit union may provide the initial notice by mailing a printed copy of it together with the documents and other materials that constitute the share account agreement or at an earlier time. Similarly, a credit union may provide the initial notice by hand-delivering a printed copy of it to the member together with the documents that constitute the membership and share account agreement or at an earlier time.

D. Compliance with initial notice requirement for existing members by effective date. A credit union is required to provide an initial notice to each of its current members not later than July 1, 2001 (§716.18(b)). A credit union complies with this provision of the rule if it mails a printed copy of the notice to the member's last known address.

E. Annual notice. During the continuation of the member relationship, a credit union also must provide an annual notice to the member, as described in §716.5(a). A credit union must provide an annual notice to each member at least once in any period of 12 consecutive months during which the member relationship exists. A credit union may define the 12-consecutive-month period, but must consistently apply that period to the member. A credit union may define the 12-consecutive-month period as a calendar year and provide the annual notice to the member once in each calendar year following the calendar year in which it provided the initial notice.

For example, assume that Credit Union defines the 12-consecutive-month period as a calendar year and provides annual notices to all of its members on October 1 of

each year. If Alison Individual is accepted for membership by Bonanza on July 2, 2001, and thereby becomes a member, then Credit Union must provide an initial notice to Alison together with the documents that constitute the contract for membership or at an earlier time. Credit Union also must provide an annual notice to Alison by December 31, 2002. If Credit Union provides an annual notice to Alison on October 1, 2002, as it does for other members, then it must provide the next annual notice to Alison not later than October 1, 2003.

F. Method of providing the annual notice. Like the initial notice, the annual notice must be provided so that each member can reasonably be expected to receive actual notice, in writing, of a credit union's privacy policies and practices (§716.9(a)). A credit union complies with this provision of the rule if it mails a printed copy of the notice to the member's last known address.

G. Joint accounts. If two or more members jointly obtain a financial product or service, other than a loan, then a credit union may provide one initial notice to those members jointly. Similarly, a credit union may provide one annual notice to those members jointly.

H. Information described in the initial and annual notices. The initial and annual notices must include an accurate description of the following four items of information:

1. The categories of nonpublic personal information that the credit union collects (§716.6(a)(1));
2. The fact that the credit union does not disclose nonpublic personal information about its current members to affiliates or nonaffiliated third parties, except as

authorized by §§716.14 and 716.15 (§716.6(a)(2)-(3)). When describing the categories with respect to those parties, the credit union is required to state only that it makes disclosures to other nonaffiliated third parties as permitted by law (§716.6(c));

3. The categories of nonpublic personal information about the credit union's former members that it discloses and the categories of affiliates and nonaffiliated third parties to whom it discloses nonpublic personal information about its former members (§716.6(a)(4));

4. The credit union's policies and practices with respect to protecting the confidentiality and security of nonpublic personal information (§716.6(a)(8)).

For each of these four items of information above, a credit union may use a sample clause contained in Appendix A. The NCUA Board emphasizes that a credit union may use a sample clause only if that clause accurately describes its actual policies and practices.

I. Sample notice. A credit union ("Credit Union") that (i) does not have any affiliates and (ii) only discloses nonpublic personal information to nonaffiliated third parties as authorized under §§716.14 and 716.15, may comply with the requirements of § 716.6 of the rule by using the following sample notice, if applicable.

Credit union collects nonpublic personal information about you from the following sources:

- ♦ Information we receive from you on applications or other forms;
- ♦ Information about your transactions with us or others; and

- Information we receive from a consumer reporting agency. [2]

We do not disclose any nonpublic personal information about you to anyone, except as permitted by law.

If you decide to terminate your membership or become an inactive member, we will adhere to the privacy policies and practices as described in this notice.

Credit union restricts access to your personal and account information to those employees who need to know that information to provide products or services to you. Credit union maintains physical, electronic, and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

J. Initial and annual notices must be clear and conspicuous. NCUA emphasizes that a credit union must ensure that both the initial and annual notices must be clear and conspicuous, as defined in §716.3(b).

List of Subjects

12 CFR part 716

Consumer protection, Credit unions, Privacy, Reporting and recordkeeping requirements.

12 CFR part 741

Bank deposit insurance, Credit Unions, Reporting and recordkeeping requirements.

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[2] A credit union is required to describe only those general categories that apply to its policies and practices. Accordingly, if a credit union does not collect information from "a consumer reporting agency," for instance, then it need not describe that category in its notices.

By the National Credit Union Administration Board on May 8, 2000.

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Sheila A. Albin

Acting Secretary of the Board

For the reasons set out in the preamble, it is proposed that 12 CFR chapter VII be amended by adding a new part 716 to read as follows:

PART 716–PRIVACY OF CONSUMER FINANCIAL INFORMATION

Sec.

Authority: 15 U.S.C. 6801 et seq., 12 U.S.C. 1751 et seq.

§716.1 Purpose and scope.

(a) Purpose. This part governs the treatment of nonpublic personal information

about consumers by the credit unions listed in paragraph (b) of this section. This part:

(1) Requires a credit union to provide notice to members about its privacy policies and practices;

(2) Describes the conditions under which a credit union may disclose nonpublic personal information about consumers to nonaffiliated third parties; and

(3) Provides a method for consumers to prevent a credit union from disclosing that information to most nonaffiliated third parties by "opting out" of that disclosure, subject to the exceptions in §§716.13, 716.14, and 716.15.

(b) Scope. (1) This part applies only to nonpublic personal information about individuals who obtain financial products or services for personal, family or household purposes. This part does not apply to information about companies or about individuals who obtain financial products or services for business, commercial or agricultural purposes. This part applies to federally-insured credit unions. This part refers to a federally-insured credit union as "you" or "the credit union."

(2) Nothing in this part modifies, limits, or supersedes the standards governing individually identifiable financial information promulgated by the Secretary of Health and Human Services under the authority of §§262 and 264 of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d-1320d-8).

§716.2 Rule of construction.

The examples in this part and the sample clauses in Appendix A of this part are not exclusive. Compliance with an example or use of a sample clause, to the extent applicable, constitutes compliance with this part.

§716.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) (1) Affiliate means any company that controls, is controlled by, or is under common control with another company.

(2) Examples. (i) An affiliate of a federal credit union is a credit union service organization (CUSO), as provided in 12 CFR part 712, that is controlled by the federal credit union.

(ii) An affiliate of a federally-insured, state-chartered credit union is a company that is controlled by the credit union.

b) (1) Clear and conspicuous means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

(2) Examples. (i) Reasonably understandable. You make your notice reasonably understandable if you:

(A) Present the information contained in the notice in clear, concise sentences, paragraphs and sections;

(B) Use short, explanatory sentences or bullet lists whenever possible;

(C) Use definite, concrete, everyday words and active voice whenever possible;

(D) Avoid multiple negatives;

(E) Avoid legal and highly technical business terminology wherever possible; and

(F) Avoid explanations that are imprecise and readily subject to different interpretations.

(ii) Designed to call attention. You design your notice to call attention to the nature and significance of the information in it if you:

(A) Use a plain-language heading to call attention to the notice;

(B) Use a typeface and type size that are easy to read;

(C) Provide wide margins and ample line spacing;

(D) Use boldface or italics for key words; and

(E) In a form that combines your notice with other information, use distinctive type size, style, and graphic devices, such as shading or sidebars.

(iii) Notices on web sites. If you provide notices on a web page, you design your notice to call attention to the nature and significance of the information in it if you use text or visual cues to encourage scrolling down the page if necessary to view the entire notice and ensure that other elements on the web site (such as text graphics, hyperlinks or sound) do not distract attention form the notice, and you either:

(A) Place the notice on a screen frequently accessed by consumers, such as a home page or a page on which transactions are conducted; or

(B) Place a link on a screen frequently accessed by consumers, such as a home page or a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature and relevance of the notice.

(c) Collect means to obtain information that you organize or can retrieve by the name of an individual or by identifying number, symbol, or other identifying particular assigned to the individual, irrespective of the source of the underlying information.

(d) Company means any corporation, limited liability company, business trust, general or limited partnership, association or similar organization.

(e) (1) Consumer means an individual who obtains or has obtained a financial product or service from you, that is to be used primarily for personal, family or household purposes, or that individual's legal representative.

(2) Examples. (i) An individual who provides nonpublic personal information to you in connection with obtaining or seeking to obtain credit union membership is your consumer regardless of whether you establish a member relationship.

(ii) An individual who provides nonpublic personal information to you in connection with using your ATM is your consumer.

(iii) If you hold ownership or servicing rights to an individual's loan, the individual is your consumer, even if you hold those rights in conjunction with one or more financial institutions. (The individual is also a consumer with respect to the other financial institutions involved). This applies, even if you, or another financial institution with those rights, hire an agent to collect on the loan or to provide processing or other services.

(iv) An individual who is a consumer of another financial institution is not your consumer solely because you act as agent for, or provide processing or other services to, that financial institution.

(v) An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.

(f) Consumer reporting agency has the same meaning as in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

(g) Control of a company means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the NCUA determines. With respect to state-chartered credit unions, NCUA will consult with the appropriate state regulator prior to making its determination.

(4) Example. NCUA will presume a credit union has a controlling influence over the management or policies of a CUSO, if the CUSO is 67% owned by credit unions.

(h) Credit union means a federal or state-chartered credit union that the National Credit Union Share Insurance Fund insures.

(i) Customer means a consumer who has a customer relationship with a financial institution other than a credit union.

(j) Customer relationship means a continuing relationship between a consumer and a financial institution other than a credit union.

(k) Federal functional regulator means–

(1) The National Credit Union Administration Board;

(2) The Board of Governors of the Federal Reserve System;

(3) The Office of the Comptroller of the Currency;

(4) The Board of Directors of the Federal Deposit Insurance Corporation;

(5) The Director of the Office of Thrift Supervision; and

(6) The Securities and Exchange Commission.

(l) (1) Financial institution means any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activity as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) Examples of financial institutions may include, but are not limited to: credit unions; banks; insurance companies; securities brokers, dealers, and underwriters; loan brokers and servicers; tax planners and preparation services; personal property appraisers; real estate appraisers; career counselors for employees in financial occupations; digital signature services; courier services; real estate settlement services; manufacturers of computer software and hardware; and travel agencies operated in connection with financial services.

(3) Financial institution does not include:

(i) Any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);

(ii) The Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.); or

(iii) Institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights) or similar transactions related to a transaction of a consumer, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.

(m) (1) Financial product or service means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) Financial service includes your evaluation or brokerage of information that you collect in connection with a request or an application from a consumer for a financial product or service.

(n) Member means a consumer who has a member relationship with you. For purposes of this part only, it will include certain nonmembers.

(o) (1) Member relationship means a continuing relationship between a consumer and you under which you provide one or more financial products or services to the consumer that are to be used primarily for personal, family or household purposes. As noted in the examples, this will include certain consumers that are not your members.

(2) Examples. (i) A consumer has a continuing relationship with you if the consumer:

(A) Is your member as defined in your bylaws;

(B) Is a nonmember who has a share, share draft, or credit card account with

you jointly with a member;

(C) Is a nonmember who has a loan that you service;

(D) Is a nonmember who has an account with you and you are a credit union that has been designated as a low-income credit union; or

(E) Is a nonmember who has an account in a federally-insured, state-chartered credit union pursuant to state law.

(ii) A consumer does not, however, have a member relationship with you if the consumer is a nonmember and:

(A) The consumer only obtains a financial product or service in isolated transactions, such as using your ATM to withdraw cash from an account maintained at another financial institution or purchasing travelers checks; or

(B) You sell the consumer's loan and do not retain the rights to service that loan.

(p)(1) Nonaffiliated third party means any person except:

(i) Your affiliate; or

(ii) A person employed jointly by you and any company that is not your affiliate (but nonaffiliated third party includes the other company that jointly employs the person).

(q)(1) Nonpublic personal information means:

(i) Personally identifiable financial information; and

(ii) Any list, description or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information.

(2) Nonpublic personal information does not include:

(i) Publicly available information, except as included on a list described in paragraph (q)(1)(ii) of this section; or

(ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information, other than publicly available information.

(3) Examples of lists. (i) Nonpublic personal information includes any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information, other than publicly available information, such as account numbers.

(ii) Nonpublic personal information does not include any list of individuals' names and addresses that contains only publicly available information, is not derived using personally identifiable financial information, other than publicly available information, either in whole or in part, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a credit union, other than publicly available information.

(r) (1) Personally identifiable financial information means any information:

(i) A consumer provides to you to obtain a financial product or service from you;

(ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or

(iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.

(2) Personally identifiable financial information does not include publicly available information.

(3) Examples. (i) Information included. Personally identifiable financial information includes:

(A) Information a consumer provides to you on an application to obtain membership, a loan, credit card or other financial product or service;

(B) Account balance information, payment history, overdraft history, and credit or debit card purchase information;

(C) The fact that an individual is or has been one of your members or has obtained a financial product or service from you;

(D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;

(E) Any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on a loan or servicing a loan;

(F) Any information you collect through an Internet “cookie” (an information collecting device from a web server); and

(G) Information from a consumer report.

(ii) Information not included. Personally identifiable financial information does not include:

(A) A list of names and addresses of customers of an entity that is not a financial institution; and

(B) Information that does not identify a consumer, such as aggregate

information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(s) (1) Publicly available information means any information that you have a reasonable basis to believe is lawfully made available to the general public from:

(i) Federal, state or local government records;

(ii) Widely distributed media; or

(iii) Disclosures to the general public that are required to be made by federal, state or local law.

(2) Reasonable basis. You have a reasonable basis to believe that information is lawfully made available to the general public if you have taken steps to determine:

(i) That the information is of the type that is available to the general public; and

(ii) Whether an individual can direct that the information not be made available to the general public and, if so, that your member or consumer has not done so.

(3) Examples. (i) Government records. Publicly available information in government records includes information in government real estate records and security interest filings.

(ii) Widely distributed media. Publicly available information from widely distributed media includes information from a telephone book, a television or radio program, a newspaper or a web site that is available to the general public on an unrestricted basis. A web site is not restricted merely because an Internet service provider or site operator requires a fee or a password, so long as access is available to the general public.

(iii) Reasonable basis. (1) You have a reasonable basis to believe that mortgage information is lawfully made available to the general public if you have determined that the information is of the type included on the public record in the jurisdiction where the mortgage would be recorded.

(2) You have a reasonable basis to believe that an individual's telephone number is lawfully made available to the general public if you have located the telephone number in the telephone book or have been informed by the consumer that the telephone number is not unlisted.

(t) You means a federally-insured credit union.

SUBPART A – PRIVACY AND OPT OUT NOTICES

§716.4 Initial privacy notice to consumers required.

(a) Initial notice requirement. You must provide a clear and conspicuous notice that accurately reflects your privacy policies and practices to a:

(1) Member, not later than when you establish a member relationship, except as provided in paragraph (e) of this section; and

(2) Consumer, before you disclose any nonpublic personal information about the consumer to any nonaffiliated third party, if you make such a disclosure other than as authorized by §§716.14 and 716.15.

(b) When initial notice to a consumer is not required. You are not required to provide an initial notice to a consumer under paragraph (a) of this section if:

(1) You do not disclose any nonpublic personal information about the consumer to any nonaffiliated third party, other than as authorized by §§716.14 and 716.15; and

(2) You do not have a member relationship with the consumer.

(c) When you establish a member relationship. (1) General Rule. You establish a member relationship when you and the consumer enter into a continuing relationship.

(2) Special rule for loans. You establish a member relationship with a consumer when you originate, or acquire the servicing rights to a loan to the consumer for personal, household or family purposes and that is the only basis for the member relationship. If you subsequently transfer the servicing rights to that loan to another financial institution, the member relationship transfers with the servicing rights.

(3)(i) Examples of establishing member relationship. You establish a member relationship when the consumer:

(A) Becomes your member under your bylaws;

(B) Is a nonmember and opens a credit card account with you jointly with a member under your procedures;

(C) Is a nonmember and executes the contract to open a share or share draft account with you or obtains credit from you jointly with a member, including an individual acting as a guarantor;

(D) Is a nonmember and opens an account with you and you are a credit union designated as a low-income credit union;

(E) Is a nonmember and opens an account with you pursuant to state law and you are a state-chartered credit union.

(ii) Examples of loan rule. You establish a member relationship with a consumer who obtains a loan for personal, family, or household purposes when you:

(A) Originate the loan to the consumer and retain the servicing rights; or

(B) Purchase the servicing rights to the consumer's loan.

(d) Existing members. When an existing member obtains a new financial product or service that is to be used primarily for personal, family, or household purposes, you satisfy the initial notice requirements of paragraph (a) of this section as follows:

(1) You may provide a revised policy notice, under §716.8, that covers the member's new financial product or service; or

(2) If the initial, revised, or annual notice that you most recently provided to that member was accurate with respect to the new financial product or service, you do not need to provide a new privacy notice under paragraph (a) of this section.

(e) Exceptions to allow subsequent delivery of notice. (1) You may provide the initial notice required by paragraph (a)(1) of this section within a reasonable time after you establish a member relationship if:

(i) Establishing the member relationship is not at the member's election;

(ii) Providing notice not later than when you establish a member relationship would substantially delay the member's transaction and the member agrees to receive the notice at a later time.

(2) Examples of exceptions. (i) Not at member's election. Establishing a member relationship is not at the member's election if you acquire a member's deposit liability from another financial institution and the member does not have a choice about your acquisition.

(ii) Substantial delay of member's transaction. Providing notice not later than when you establish a member relationship would substantially delay the member's transaction when:

(A) You and the individual agree over the telephone to enter into a member relationship involving prompt delivery of the financial product or service; or

(B) You establish a member relationship with an individual under a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.) or similar student loan programs where loan proceeds are disbursed promptly without prior communication between you and the member.

(iii) No substantial delay of member's transaction. Providing notice not later than when you establish a member relationship would not substantially delay the member's transaction when the relationship is initiated in person at your office or through other means by which the member may view the notice, such as on a web site.

(f) Joint relationships. If two or more consumers jointly obtain a financial product or service, other than a loan, from you, you may satisfy the requirements of paragraph (a) of this section by providing one initial notice to those consumers jointly.

(g) Delivery. When you are required to deliver an initial privacy notice by this section, you must deliver it according to the methods in §716.9. If you use a short-form initial notice for nonmember consumers according to §716.6(c), you may deliver your privacy notice according to §716.6(c)(3).

§716.5 Annual privacy notice to members required.

(a)(1) General rule. You must provide a clear and conspicuous notice to

members that accurately reflects your privacy policies and practices not less than annually during the continuation of the member relationship. Annually means at least once in any period of 12 consecutive months during which that relationship exists. You may define the 12-consecutive-month period, but you must apply it to the member on a consistent basis.

(2) Example. You provide a notice annually if you define the 12-consecutive-month period as a calendar year and provide the annual notice to the member once in each calendar year following the calendar year in which you provide the initial notice. For example, if a member opens an account on any day of year one, you must provide an annual notice to that member by December 31 of year two.

(b) (1) Termination of member relationship. You are not required to provide an annual notice to a former member.

(2) Examples. Your member becomes your former member when:

(i) An individual is no longer your member as defined in your bylaws;

(ii) In the case of a nonmember's share or share draft account, the account is inactive under the credit union's policies;

(iii) In the case of a nonmember's closed-end loan, the loan is paid in full, you charge off the loan, or you sell the loan without retaining servicing rights;

(iv) In the case of a credit card relationship or other open-end credit relationship with a nonmember, you no longer provide any statements or notices to the nonmember concerning that relationship or you sell the credit card receivables without retaining servicing rights; or

(v) You have not communicated with the nonmember about the relationship for a period of twelve consecutive months, other than to provide annual privacy notices or promotional material.

(c) Delivery. When you are required to deliver an annual privacy notice by this section, you must deliver it according to the methods in §716.9.

§716.6 Information to be included in initial and annual privacy notices.

(a) General rule. The initial and annual privacy notices under §§716.4 and 716.5 must include each of the following items of information that applies to you or to the consumers to whom you send your privacy notice, in addition to any other information you wish to provide:

(1) The categories of nonpublic personal information that you collect;

(2) The categories of nonpublic personal information that you disclose;

(3) The categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information, other than those parties to whom you disclose information under §§716.14 and 716.15;

(4) The categories of nonpublic personal information about your former members that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose it, other than those parties to whom you disclose information under §§716.14 and 716.15;

(5) If you disclose nonpublic personal information to a nonaffiliated third party under §716.13 (and no other exception applies to that disclosure), a separate statement of the categories of information you disclose and the categories of third parties with

whom you have contracted;

(6) An explanation of the consumer's right under §716.10(a) to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the methods by which the consumer may exercise that right at that time;

(7) Any disclosures that you make under section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(A)(iii)) (that is, notices regarding the ability to opt out of disclosure of information among affiliates);

(8) Your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information; and

(9) Any disclosures you make under paragraph (b) of this section.

(b) Description of nonaffiliated third parties subject to exceptions. If you disclose nonpublic personal information to third parties as authorized under §§716.14 and 716.15, you are not required to list those exceptions in the initial or annual privacy notices required by §§716.4 and 716.5. When describing the categories with respect to those parties, you are required to state only that you make disclosures to other nonaffiliated third parties as permitted by law.

(c) Short-form initial notice with opt out notice for nonmember consumers. (1) You may satisfy the initial notice requirements in §§716.4(a)(2), 716.7(b), and 716.7(c) for a consumer who is not a member by providing a short-form initial notice at the same time as you deliver an opt out notice as required in §716.7.

(2) A short-form initial notice must:

(i) Be clear and conspicuous;

(ii) State that your privacy notice is available upon request; and

(iii) Explain a reasonable means by which the consumer may obtain that notice.

(3) You must deliver your short-form initial notice according to §716.9. You are not required to deliver your privacy notice with your short form initial notice. You instead may simply provide the consumer a reasonable means to obtain your privacy notice. If a consumer who receives your short-form notice requests your privacy notice, you must deliver your privacy notice according to §716.9.

(4) Examples of obtaining privacy notice. You provide a reasonable means by which a consumer may obtain a copy of your privacy notice if you:

(i) Provide a toll-free telephone number that the consumer may call to request the notice; or

(ii) For a consumer who conducts business in person at your office, maintain copies of the notice on hand that you provide to a consumer immediately upon request.

(d) Future disclosures. Your notice may include:

(1) Categories of nonpublic personal information that you reserve the right to disclose in the future, but do not currently disclose; and

(2) Categories of affiliates or nonaffiliated third parties to whom you reserve the right in the future to disclose, but to whom you do not currently disclose, nonpublic personal information.

(e) Examples. (1) Categories of nonpublic personal information that you collect. You satisfy the requirement to categorize the nonpublic personal information that you collect if you list the following categories, as applicable:

(i) Information from the consumer;

(ii) Information about the consumer's transactions with you or your affiliates;

(iii) Information about the consumer's transactions with nonaffiliated third parties; and

(iv) Information from a consumer reporting agency.

(2) Categories of nonpublic personal information you disclose. (i) You satisfy the requirement to categorize the nonpublic personal information that you disclose if you list the categories described in paragraph (e)(1) of this section, as applicable, and a few examples to illustrate the types of information in each category.

(ii) If you reserve the right to disclose all of the nonpublic personal information about consumers that you collect, you may simply state that fact without describing the categories or examples of the nonpublic personal information you disclose.

(3) Categories of affiliates and nonaffiliated third parties to whom you disclose. You satisfy the requirement to categorize the affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information if you list the following categories, as applicable, and a few examples to illustrate the types of third parties in each category.

(i) Financial service providers;

(ii) Non-financial companies; and

(iii) Others.

(4) Disclosures under exception for service providers and joint marketers. If you disclose nonpublic personal information under the exception in §716.13 to a nonaffiliated third party to market products or services that you offer alone or jointly with

another financial institution, you satisfy the disclosure requirement of paragraph (a)(5) of this section if you:

(i) List the categories of nonpublic personal information you disclose, using the same categories and examples you used to meet the requirements of paragraphs (a)(2) of this section, as applicable; and

(ii) State whether the third party is:

(A) A service provider that performs marketing services on your behalf or on behalf of you and another financial institution; or

(B) A financial institution with whom you have a joint marketing agreement.

(5) Simplified notices. If you do not disclose, and do not intend to disclose, nonpublic personal information about members or former members to affiliates or nonaffiliated third parties except as authorized under §§716.14 and 716.15, you may simply state that fact, in addition to the information you must provide under paragraphs (a)(1), (a)(8), (a)(9) and (c) of this section.

(6) Confidentiality and security. You describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information if you do both of the following:

(i) Describe in general terms who is authorized to have access to the information.

(ii) State whether you have security practices and procedures in place to ensure the confidentiality of the information in accordance with your policy. You are not required to describe technical information about the safeguards you use.

(7) Joint notice with affiliates. You may provide a joint notice from you and one

or more of your affiliates or other financial institutions, as specified in the notice, as long as the notice is accurate with respect to you and the other institution.

§716.7 Form of opt out notice to consumers and opt out methods.

(a)(1) Form of opt out notice. If you are required to provide an opt out notice under §716.10(a)(1), you must provide a clear and conspicuous notice to each of your consumers that accurately explains the right to opt out under that section. The notice must state:

(i) That you disclose or reserve the right to disclose nonpublic personal information about your consumer to a nonaffiliated third party;

(ii) That the consumer has the right to opt out of that disclosure; and

(iii) A reasonable means by which the consumer may exercise the opt out right.

(2) Examples. (i) Adequate opt out notice. You provide adequate notice that the consumer can opt out of the disclosure of nonpublic personal information to a nonaffiliated third party if you:

(A) Identify all of the categories of nonpublic personal information that you disclose or reserve the right to disclose and all of the categories of nonaffiliated third parties to whom you disclose the information, as described in §716.6(a)(2) and (3) and state that the consumer can opt out of the disclosure of that information; and

(B) Identify the financial products or services that the consumer obtains from you, either singly or jointly, to which the opt out direction would apply.

(ii) Reasonable opt out means. You provide a reasonable means to exercise an opt out right if you:

(A) Designate check-off boxes in a prominent position on the relevant forms with the opt out notice;

(B) Include a reply form together with the opt out notice;

(C) Provide an electronic means to opt out, such as a form that can be sent via electronic mail or a process at your web site, if the consumer agrees to the electronic delivery of information; or

(D) Provide a toll-free telephone number that consumers may call to opt out.

(iii) Unreasonable opt out means. You do not provide a reasonable means of opting out if:

(A) The only means of opting out is for the consumer to write his or her own letter to exercise that opt out right; or

(B) The only means of opting out as described in any notice subsequent to the initial notice is to use a check-off box that was provided with the initial notice but not included with the subsequent notice.

(iv) Specific opt out means. You may require each consumer to opt out through a specific means, as long as that means is reasonable for that consumer.

(b) Same form as initial notice permitted. You may provide the opt out notice together with or on the same written or electronic form as the initial notice you provide in accordance with §716.4.

(c) Initial notice required when opt out notice delivered subsequent to initial notice. If you provide the opt out notice later than required for the initial notice in accordance with §716.4, you must also include a copy of the initial notice in writing or, if

the consumer agrees, electronically.

(d) Joint relationships. (1) If two or more consumers jointly obtain a financial product or service, other than a loan, from you, you may provide only a single opt out notice. Your opt out notice must explain how you will treat an opt out direction by a joint consumer as explained in the examples in paragraph (d)(5) of this section.

(2) Any of the joint consumers may exercise the right to opt out. You may either:

(i) Treat an opt out direction by a joint consumer to apply to all of the associated joint consumers; or

(ii) Permit each joint consumer to opt out separately.

(3) If you permit each joint consumer to opt out separately, you must permit one of the joint consumers to opt out on behalf of all of the joint consumers.

(4) You may not require all joint consumers to opt out before you implement any opt out direction.

(5) Example. If John and Mary have a joint share account with you and arrange for you to send statements to John's address, you may do any of the following, but you must explain in your opt out notice which opt out policy you will follow:

(i) Send a single opt out notice to John's address, but you must accept an opt out direction from either John or Mary.

(ii) Treat an opt out direction by either John or Mary as applying to the entire account. If you do so, and John opts out, you may not require Mary to opt out as well before implementing John's opt out direction.

(iii) Permit John and Mary to make different opt out directions. If you do so, and if John and Mary both opt out, you must permit one or both of them to notify you in a single response (such as on a form or through a telephone call).

(e) Time to comply with opt out. You must comply with the consumer's opt out direction as soon as reasonably practicable after you receive it.

(f) Continuing right to opt out. A consumer may exercise the right to opt out at any time.

(g) Duration of consumer's opt out direction. (1) A consumer's direction to opt out under this section is effective until the consumer revokes it in writing or, if the consumer agrees, electronically.

(2) When a member relationship terminates, the member's opt out direction continues to apply to the nonpublic personal information that you collected during or related to the relationship. If the individual subsequently establishes a new member relationship with you, the opt out direction that applied to the former relationship does not apply to the new relationship.

(h) Delivery. When you are required to deliver an opt out notice by this section, you must deliver it according to the methods in §716.9.

§716.8 Revised privacy notices.

(a) General rule. Except as otherwise authorized in this part, you must not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party other than as described in the initial notice that you provided to that consumer under §716.4, unless:

(1) You have provided to the consumer a revised notice that accurately describes your policies and practices;

(2) You have provided to the consumer a new opt out notice;

(3) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and

(4) The consumer does not opt out.

(b) Examples. (1) Except as otherwise permitted by §§716.13, 716.14 and 716.15, you must provide a revised notice if you–

(i) Disclose a new category of nonpublic personal information to any nonaffiliated third party;

(ii) Disclose nonpublic personal information to a new category of nonaffiliated third party; or

(iii) Disclose nonpublic personal information about a former member to a nonaffiliated third party, and that former member has not had the opportunity to exercise an opt out right regarding that disclosure.

(2) A revised notice is not required if you disclose nonpublic personal information to a new nonaffiliated third party that you adequately described in your prior notice.

(c) Delivery. When you are required to deliver a revised privacy notice by this section, you must deliver it according to the methods in §716.9.

§716.9 Delivering privacy and opt out notices.

(a) How to provide notices. You must provide any privacy notices and opt out notices, including short-form initial notices, that this part requires so that each consumer

can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically.

(b) (1) Examples of reasonable expectation of actual notice. You may reasonably expect that a consumer will receive actual notice if you:

(i) Hand-deliver a printed copy of the notice to the consumer;

(ii) Mail a printed copy of the notice to the last known address of the consumer;

(iii) For the consumer who conducts transactions electronically, post the notice on the electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular financial product or service;

(iv) For an isolated transaction with the consumer, such as an ATM transaction, post the notice on the ATM screen and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining the particular financial product or service.

(2) Examples of unreasonable expectations of actual notice. You may not, however, reasonably expect that a consumer will receive actual notice if you:

(i) Only post a sign in your branch or office or generally publish advertisements of your privacy policies and practices;

(ii) Send the notice via electronic mail to a consumer who does not obtain a financial product or service from you electronically.

(c) Annual notices only. You may reasonably expect that a member will receive actual notice of your annual privacy notice if:

(1) The member uses your web site to access financial products and services electronically and agrees to receive notices at your web site and you post your current

privacy notice continuously in a clear and conspicuous manner on your web site; or

(2) The member has requested that you refrain from sending any information regarding the member relationship, and your current privacy notice remains available to the member upon request.

(d) Oral description of notice insufficient. You may not provide any notice required by this part solely by orally explaining the notice, either in person or over the telephone.

(e) Retention or accessibility of notices for members. (1) For members only, you must provide the initial notice required by §716.4 (a)(1), the annual notice required by §716.5(a) and the revised notice required by §716.8 so that the member can retain them or obtain them later in writing or, if the member agrees, electronically.

(2) Examples of retention or accessibility. You provide the privacy notice to the member so that the member can retain it or obtain it later if you:

(i) Hand-deliver a printed copy of the notice to the member;

(ii) Mail a printed copy of the notice to the last known address of the member upon request of the member; or

(iii) Make your current privacy notice available on a web site (or a link to another web site) for the member who obtains a financial product or service electronically and agrees to receive the notice at the web site.

SUBPART B – LIMITS ON DISCLOSURES

§716.10 Limits on disclosure of nonpublic personal information to nonaffiliated third parties.

(a) (1) Conditions for disclosure. Except as otherwise authorized in this part, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless:

(i) You have provided to the consumer an initial notice as required under §716.4;

(ii) You have provided to the consumer an opt out notice as required in §716.7;

(iii) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and

(iv) The consumer does not opt out.

(2) Opt out definition. Opt out means a direction by the consumer that you not disclose nonpublic personal information about that consumer to a nonaffiliated third party, other than as permitted by §§716.13, 716.14 and 716.15.

(3) Examples of reasonable opportunity to opt out. You provide a consumer with a reasonable opportunity to opt out if:

(i) By mail. You mail the notices required in paragraph (a)(1) of this section to the consumer and allow the consumer to opt out by mailing a form, calling a toll-free telephone number, or any other reasonable means within 30 days from the date you mailed the notices.

(ii) By electronic means. A member opens an on-line account with you and agrees to receive the notices required in paragraph (a)(1) of this section electronically, and you make the notices available to the member on your web site and allow the member to opt out by any reasonable means within 30 days after the date that the member acknowledges receipt of the notices.

(iii) Isolated transaction with consumer. For an isolated transaction, such as the purchase of a traveler's check by a consumer, you provide the consumer with a reasonable opportunity to opt out if you provide the notices required in paragraph (a)(1) of this section at the time of the transaction and request that the consumer decide, as a necessary part of the transaction, whether to opt out before completing the transaction.

(b) Application of opt out to all consumers and all nonpublic personal information. (1) You must comply with this section, regardless of whether you and the consumer have established a member relationship.

(2) Unless you comply with this section, you may not, directly or through an affiliate, disclose any nonpublic personal information about a consumer that you have collected, regardless of whether you collected it before or after receiving the direction to opt out from the consumer.

(c) Partial opt out. You may allow a consumer to select certain nonpublic personal information or certain nonaffiliated third parties with respect to which the consumer wishes to opt out.

§716.11 Limits on redisclosure and reuse of information.

(a) (1) Information you receive under an exception. If you receive nonpublic personal information from a nonaffiliated financial institution under an exception in §716.14 or 716.15 of this part, your disclosure and use of that information is limited as follows:

(i) You may disclose the information to the affiliates of the financial institution from which you received the information; and

(ii) You may disclose the information to your affiliates, but your affiliates may, in turn, disclose and use the information only to the extent that you may disclose and use the information; and

(iii) You may disclose and use the information pursuant to an exception in §716.14 or 716.15 in the ordinary course of business to carry out the activity covered by the exception under which you received the information.

(2) Example. If you receive a member list from a credit union in order to provide correspondent services under the exception in §716.14(a), you may disclose that information under any exception in §716.14 or 716.15 in order to provide those services. For example, you could disclose the information in response to a properly authorized subpoena or to your attorneys, accountants, and auditors. You could not disclose that information to a third party for marketing purposes or use that information for your own marketing purposes.

(b)(1) Information you receive outside of an exception. If you receive nonpublic personal information from a nonaffiliated financial institution other than under an exception in §716.14 or 716.15 of this part, you may disclose the information only:

(i) To the affiliates of the financial institution from which you received the information;

(ii) To your affiliates, but your affiliates may, in turn, disclose the information only to the extent that you can disclose the information;

(iii) To any other person, if the disclosure would be lawful if made directly to that person by the financial institution from which you received the information; and

(iv) Pursuant to an exception in §716.14 or 716.15.

(2) Example. If you obtain a customer list from a nonaffiliated financial institution outside of the exceptions in §§716.14 and 716.15,

(i) You may use the list for your own purposes;

(ii) You may disclose that list to another non-affiliated third party only if the financial institution from which you purchased the list could have disclosed the list to that third party, that is you may disclose the list in accordance with the privacy policy of the financial institution from which you received the list, as limited by the opt out direction of each consumer whose nonpublic personal information you intend to disclose; and

(iii) You may disclose that list as permitted by §716.14 or 716.15, such as to your attorneys or accountants.

(c) Information you disclose under an exception. If you disclose nonpublic personal information to a nonaffiliated third party under an exception in §716.14 or 716.15 of this part, the disclosure and use of that information by the third party is limited as follows:

(1) The third party may disclose the information to your affiliates;

(2) The third party may disclose the information to its affiliates, but its affiliates may, in turn, disclose and use the information only to the extent that the third party may disclose and use the information; and

(3) The third party may disclose and use the information pursuant to an exception in §716.14 or 716.15 in the ordinary course of business to carry out the activity covered by the exception under which it received the information.

(d) Information you disclose outside of an exception. If you disclose nonpublic personal information to a nonaffiliated third party other than under an exception in §716.14 or 716.15 of this part, the third party may disclose the information only:

(1) To your affiliates;

(2) To its affiliates, but its affiliates, in turn, may disclose the information only to the extent the third party can disclose the information;

(3) To any other person, if the disclosure would be lawful if made directly to that person by you; and

(4) Pursuant to an exception in §716.14 or 716.15.

§716.12 Limits on sharing of account number information for marketing purposes.

(a) General prohibition on disclosure of account numbers. You must not, directly or through an affiliate, disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a consumer's credit card account, share account or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing or other marketing through electronic mail to the consumer.

(b) Exceptions. Paragraph (a) of this section does not apply if you disclose an

account number or similar form of access number or access code:

(1) To your agent or service provider solely in order to perform marketing for your own products or services, as long as the agent or service provider cannot directly initiate charges to the account; or

(2) To a participant in a private label credit card program or an affinity or similar program where the participants in the program are identified to the member when the member enters into the program.

(c) Examples. (1) Account number. An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as you do not provide the recipient with a means to decode the number or code.

(2) Transaction account. A transaction account is an account other than a share or credit card account. A transaction account does not include an account to which a third party cannot initiate a charge.

SUBPART C -- EXCEPTIONS

§716.13 Exception to opt out requirements for service providers and joint marketing.

(a) General rule. (1) The opt out requirements in §§716.7 and 716.10 do not apply when you provide nonpublic personal information to a nonaffiliated third party to perform services for you or functions on your behalf, if you:

(i) Provide the initial notice in accordance with §716.4; and

(ii) Enter into a contractual agreement with the third party that prohibits the third

party from disclosing or using the information other than to carry out the purposes for which you disclosed the information, including use under an exception in §716.14 or 716.15 in the ordinary course of business to carry out those purposes.

(2) Example. If you disclose nonpublic personal information under this section to a financial institution with which you perform joint marketing, your contractual agreement with that institution meets the requirements of paragraph (a)(1)(ii) of this section if it prohibits the institution from disclosing or using the nonpublic personal information except as necessary to carry out the joint marketing or under an exception in §716.14 or 716.15 in the ordinary course of business to carry out that joint marketing.

(b) Service may include joint marketing. The services that a nonaffiliated third party performs for you under paragraph (a) of this section may include marketing of your own products or services or marketing of financial products or services offered pursuant to joint agreements between you and one or more financial institutions.

(c) Definition of joint agreement. For purposes of this section, joint agreement means a written contract pursuant to which you and one or more financial institutions jointly offer, endorse, or sponsor a financial product or service.

§716.14 Exceptions to notice and opt out requirements for processing and servicing transactions.

(a) Exceptions for processing transactions at consumer's request. The requirements for initial notice in §716.4(a)(2), the opt out in §§716.7 and 716.10 and service providers and joint marketing in §716.13 do not apply if you disclose nonpublic personal information as necessary to effect, administer, or enforce a transaction that a

consumer requests or authorizes, or in connection with:

(1) Servicing or processing a financial product or service that a consumer requests or authorizes;

(2) Maintaining or servicing the consumer's account with you, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity; or

(3) A proposed or actual securitization, secondary market sale (including sales of servicing rights) or similar transaction related to a transaction of the consumer.

(b) Necessary to effect, administer, or enforce a transaction means that the disclosure is:

(1) Required, or is one of the lawful or appropriate methods, to enforce your rights or the rights of other persons engaged in carrying out the financial transaction or providing the product or service; or

(2) Required, or is a usual, appropriate or acceptable method:

(i) To carry out the transaction or the product or service business of which the transaction is a part, and record, service or maintain the consumer's account in the ordinary course of providing the financial service or financial product;

(ii) To administer or service benefits or claims relating to the transaction or the product or service business of which it is a part;

(iii) To provide a confirmation, statement or other record of the transaction, or information on the status or value of the financial service or financial product to the consumer or the consumer’s agent or broker;

(iv) To accrue or recognize incentives or bonuses associated with the transaction that are provided by you or any other party;

(v) In connection with:

(A) The authorization, settlement, billing, processing, clearing, transferring, reconciling or collection of amounts charged, debited, or otherwise paid using a debit, credit or other payment card, check or account number, or by other payment means;

(B) The transfer of receivables, accounts or interests therein; or

(C) The audit of debit, credit or other payment information.

§716.15 Other exceptions to notice and opt out requirements.

(a) Exceptions to opt out requirements. The requirements for initial notice to consumers in §716.4(a)(2), the opt out in §§716.7 and 716.10 and service providers and joint marketing in §716.13 do not apply when you disclose nonpublic personal information:

(1) With the consent or at the direction of the consumer, provided that the consumer has not revoked the consent or direction;

(2) (i) To protect the confidentiality or security of your records pertaining to the consumer, service, product or transaction;

(ii) To protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability;

(iii) For required institutional risk control or for resolving consumer disputes or inquiries;

(iv) To persons holding a legal or beneficial interest relating to the consumer; or

(v) To persons acting in a fiduciary or representative capacity on behalf of the consumer;

(3) To provide information to insurance rate advisory organizations, guaranty funds or agencies, agencies that are rating you, persons that are assessing your compliance with industry standards, and your attorneys, accountants, and auditors;

(4) To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.), to law enforcement agencies (including a federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a state insurance authority, with respect to any person domiciled in that insurance authority's state that is engaged in providing insurance, and the Federal Trade Commission), self-regulatory organizations, or for an investigation on a matter related to public safety;

(5) (i) To a consumer reporting agency in accordance with the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), or

(ii) From a consumer report reported by a consumer reporting agency;

(6) In connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of such business or unit; or

(7) (i) To comply with federal, state or local laws, rules and other applicable legal requirements;

(ii) To comply with a properly authorized civil, criminal or regulatory investigation, or subpoena or summons by federal, state or local authorities; or

(iii) To respond to judicial process or government regulatory authorities having jurisdiction over you for examination, compliance or other purposes as authorized by law.

(b) Examples of consent and revocation of consent. (1) A consumer may specifically consent to your disclosure to a nonaffiliated insurance company of the fact that the consumer has applied to you for a mortgage so that the insurance company can offer homeowner's insurance to the consumer.

(2) A consumer may revoke consent by subsequently exercising the right to opt out of future disclosures of nonpublic personal information as permitted under §716.7(f).

SUBPART D – RELATION TO OTHER LAWS; EFFECTIVE DATE

§716.16 Protection of Fair Credit Reporting Act.

Nothing in this part shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), and no inference shall be drawn on the basis of the provisions of this part regarding whether information is transaction or experience information under section 603 of that Act.

§716.17 Relation to state laws.

(a) In general. This part shall not be construed as superseding, altering, or affecting any statute, regulation, order or interpretation in effect in any state, except to the extent that such state statute, regulation, order or interpretation is inconsistent with

the provisions of this part, and then only to the extent of the inconsistency.

(b) Greater protection under state law. For purposes of this section, a state statute, regulation, order or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order or interpretation affords any consumer is greater than the protection provided under this part, as determined by the Federal Trade Commission, after consultation with the National Credit Union Administration, on the Federal Trade Commission's own motion or upon the petition of any interested party.

§716.18 Effective date; transition rule.

(a) Effective date. This part is effective November 13, 2000. In order to provide sufficient time for you to establish policies and systems to comply with the requirements of this part, the National Credit Union Administration Board has extended the time for compliance with this part until July 1, 2001.

(b)(1) Notice requirement for consumers who were your members on the compliance date. By July 1, 2001, you must provide an initial notice, as required by §716.4, to consumers who are your members on July 1, 2001.

(2) Example. You provide an initial notice to consumers who are your members on July 1, 2001, if, by that date, you have established a system for providing an initial notice to all new members and have mailed the initial notice to all your existing members.

(c) Two-year grandfathering of service agreements. Until July 1, 2002, a contract that you have entered into with a nonaffiliated third party to perform services for you or

functions on your behalf satisfies the provisions of §716.13(a)(2) of this part, even if the contract does not include a requirement that the third party maintain the confidentiality of nonpublic personal information, as long as the agreement was entered into on or before July 1, 2000.

APPENDIX A TO PART 716–SAMPLE CLAUSES

Credit unions, including a group of affiliates that use a common privacy notice, may use the following sample clauses, if the clause is accurate for each institution that uses the notice.

A-1–Categories of information you collect (all credit unions)

You may use this clause, as applicable, to meet the requirement of §716.6(a)(1) to describe the categories of nonpublic personal information you collect.

Sample Clause A-1:

We collect nonpublic personal information about you from the following sources:

· Information we receive from you on applications or other forms;

· Information about your transactions with us, our affiliates, or others; and

· Information we receive from a consumer reporting agency.

A-2–Categories of information you disclose (credit unions that disclose outside of the exceptions)

You may use one of these clauses, as applicable, to meet the requirement of §716.6(a)(2) to describe the categories of nonpublic personal information you disclose. These clauses may be used if you disclose nonpublic personal information other than

as permitted by the exceptions in §§ 716.13, 716.14, and 716.15.

Sample Clause A-2, Alternative 1:

We may disclose the following kinds of nonpublic personal information about you:

· Information we receive from you on applications or other forms, such as [provide illustrative examples, such as "your name, address, social security number, assets, and income"];

· Information about your transactions with us, our affiliates, or others, such as [provide illustrative examples, such as "your account balance, payment history, parties to transactions, and credit card usage"]; and

· Information we receive from a consumer reporting agency, such as [provide illustrative examples, such as "your creditworthiness and credit history"].

Sample Clause A-2, Alternative 2:

We may disclose all of the information that we collect, as described [describe location in the notice, such as "above" or "below"].

A-3–Categories of information you disclose and parties to whom you disclose (credit unions that do not disclose outside of the exceptions)

You may use this clause, as applicable, to meet the requirements of §716.6(a)(2), (3) and (4) to describe the categories of nonpublic personal information about members and former members that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose. This clause may be used if you do not disclose nonpublic personal information to any party, other than as permitted by the

exceptions in §§716.14, and 716.15.

Sample Clause A-3:

We do not disclose any nonpublic personal information about our members and former members to anyone, except as permitted by law.

A-4–Categories of parties to whom you disclose (credit unions that disclose outside of the exceptions)

You may use this clause, as applicable, to meet the requirement of §716.6(a)(3) to describe the categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information. This clause may be used if you disclose nonpublic personal information other than as permitted by the exceptions in §§716.13, 716.14, and 716.15, as well as when permitted by the exceptions in §§716.14, and 716.15.

Sample Clause A-4:

We may disclose nonpublic personal information about you to the following types of third parties:

· Financial service providers, such as [provide illustrative examples, such as "mortgage bankers, securities broker-dealers, and insurance agents"];

· Non-financial companies, such as [provide illustrative examples, such as "retailers, direct marketers, airlines, and publishers"]; and

· Others, such as [provide illustrative examples, such as "non-profit organizations"].

We may also disclose nonpublic personal information about you to nonaffiliated

third parties as permitted by law.

A-5–Service provider/joint marketing exception

You may use one of these clauses, as applicable, to meet the requirements of § 716.6(a)(5) related to the exception for service providers and joint marketers in §716.13. If you disclose nonpublic personal information under this exception, you must describe the categories of nonpublic personal information you disclose and the categories of third parties with whom you have contracted.

Sample Clause A-5, Alternative 1:

We may disclose the following information to companies that perform marketing services on our behalf or to other financial institutions with whom we have joint marketing agreements:

· Information we receive from you on applications or other forms, such as [provide illustrative examples, such as "your name, address, social security number, assets, and income"];

· Information about your transactions with us, our affiliates, or others, such as [provide illustrative examples, such as "your account balance, payment history, parties to transactions, and credit card usage"]; and

· Information we receive from a consumer reporting agency, such as [provide illustrative examples, such as "your creditworthiness and credit history"].

Sample Clause A-5, Alternative 2:

We may disclose all of the information we collect, as described [describe location in the notice, such as "above" or "below"] to companies that perform marketing services

on our behalf or to other financial institutions with whom we have joint marketing agreements.

A-6–Explanation of opt out right (credit unions that disclose outside of the exceptions)

You may use this clause, as applicable, to meet the requirement of §716.6(a)(6) to provide an explanation of the consumer's right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the method(s) by which the consumer may exercise that right. This clause may be used if you disclose nonpublic personal information other than as permitted by the exceptions in §§716.13, 716.14, and 716.15.

Sample Clause A-6:

If you prefer that we not disclose nonpublic personal information about you to nonaffiliated third parties, you may opt out of those disclosures, that is, you may direct us not to make those disclosures (other than disclosures permitted by law). If you wish to opt out of disclosures to nonaffiliated third parties, you may [describe a reasonable means of opting out, such as "call the following toll-free number: (insert number)].

A-7–Confidentiality and security (all credit unions)

You may use this clause, as applicable, to meet the requirement of §716.6(a)(8) to describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information.

Sample Clause A-7:

We restrict access to nonpublic personal information about you to [provide an

appropriate description, such as “those employees who need to know that information to provide products or services to you”]. We maintain physical, electronic, and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

PART 741 - REQUIREMENTS FOR INSURANCE

1. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, and 1781-1790. Section 741.4 is also authorized by 31 U.S.C. 3717.

2. Add §741.220 to part 741 to read as follows:

§741.220 Privacy of consumer financial information.

Any credit union which is insured pursuant to Title II of the Act must adhere to the requirements stated in part 716 of this chapter.